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2544
No. 11992

United States
Court of Appeals

for the Ninth Circuit

POWER SERVICE CORPORATION,
a Corporation,

Appellant,

vs.

W. E. JOSLIN, doing business as CORY-JOSLIN
and MACNSONS,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 400

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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NAMES AND ADDRESSES OF ATTORNEYS

LANCIE L. WATTS,
801 Scarritt Building,
Kansas City, 6, Missouri,
Attorney for Plaintiff and Appellant.

FRANK J. HENNESSY,
United States Attorney,
Northern District of California.

RUDOLPH SCHOLZ,
Assistant United States Attorney,
Northern District of California.
422 Post Office Building,
San Francisco, California.

PAUL B. GIBSON,
Humboldt Bank Building,
San Francisco, California.
Attorneys for Defendant and Appellee.

In the Southern Division of the United States
District Court, for the Northern District of
California

No. 26113-R

POWER SERVICE CORPORATION,

a Corporation,

Plaintiff,

vs.

W. E. JOSLIN, d/b/as CORY-JOSLIN AND
MACNSONS,

Defendant.

PETITION FOR DECLARATORY JUDGMENT.
COERCIVE RELIEF AND REFORMATION

Count I.

1. Comes now the Power Service Corporation, a corporation organized and existing under and by virtue of the laws of Minnesota, and a citizen of said State, as plaintiff herein, and brings this action against W. E. Joslin, d/b/as Cory-Joslin and Macnsons, who is a citizen of the State of California, and resident of the Southern Division of the United States District Court for the Northern District of California, as defendant herein.

2. For its cause of action against defendant, plaintiff states that under date of July 11, 1944, a written contract was entered into between plaintiff and the defendant under the terms of which plaintiff agreed, in consideration of the sum of \$448,000.00, to perform all work necessary for the com-

plete erection of the boilers in Power House No. 1, at Sunflower Ordnance Works, Johnson County, Kansas, in strict accordance with the plans and specifications, and as directed in writing by the defendant, all within 120 days after the receipt from the defendant of notice to proceed with the performance of said contract; that a copy of so much of said contract as is necessary to a determination of this action, [1*] is hereto annexed, marked "Exhibit A," and made a part hereof.

3. That Paragraph 5-04 of the Specifications attached to and made a part of the above described contract, under the heading "Materials to be Furnished," provides as follows:

"5-04. (a) Materials Furnished by the Constructor. In general, all materials, equipment and machinery which will actually be incorporated into the permanent construction will be furnished by the Constructor and/or others. Materials and supplies incidental to the permanent construction, including but not limited to cutting oil, wire, fuel for construction equipment, welding bars, cement grout and concrete, scaffolding, forming temporary bracing and blocking, pipe dope and compound, all erection facilities and equipment, etc., will be supplied by the Subconstructor without cost to the Constructor over and above the Subcontract price. Fuel for use in testing operating equipment and for putting the plant in operation will be supplied by the Constructor. Materials furnished by the Construc-

* Page numbering appearing at foot of page of original certified Transcript of Record.

tor will be delivered to the Subconstructor at points and in the manner specified. Section VII hereof.

“(b) Immediately after starting work under the subcontract, the Subconstructor shall prepare a ‘list of materials’ including accessories and equipment required, and shall check this list against the materials, accessories and equipment stored in or adjacent to the Power House in order that shortages may be immediately determined. Such shortages will then be reported to the Constructor for use in obtaining the balance of materials required for the completed work. Such an inventory will be kept current by the Subconstructor during the progress [2] of the work and Subconstructor will be held responsible for advising the Constructor of his requirements sufficiently in advance of the time such items will be required to enable procurement without delaying progress.

“(c) Nearly all of the materials required for the work has been stored in Power House No. 1 or in warehouses adjacent thereto. Materials, equipment and machinery which have been stored and which have been subjected to conditions necessitating reconditioning, refinishing, refacing, cleaning, painting, packing (in valves and pumps), and similar work to properly prepare for installation and operation will be reconditioned, refinished, etc., by the Subcontractor as a part of this Subcontract, except however, that such reconditioning, refinishing, etc., shall apply only to defects which have resulted from storage and does not include inherent defects in manufacture or material. Materials, equipment and

machinery which have been broken or otherwise damaged beyond use or repair during storage or which have inherent defects in manufacture or materials caused through no fault or negligence of the Subconstructor will be replaced by the Constructor without cost to the Subconstructor."

4. That Paragraph 1-05 of said Specifications, under the heading "Commencement, Prosecution and Completion," provides as follows:

"1-05. Commencement, Prosecution and Completion. (a) The Subconstructor will be required to commence work under the subcontract within five (5) calendar days after the date of the receipt by him of Notice to Proceed and will be required to prosecute said work faithfully and energetically and to complete the work within one hundred twenty (120) calendar days, the time to be [3] computed from said date of receipt of Notice to Proceed, except as provided hereafter in this paragraph.

"(b) In the event the total payments for work actually constructed by the Subconstructor under the subcontract exceed the original amount of the subcontract, the time for completion of the subcontract will be extended in the proportion that payments for work in excess of the original amount of the subcontract bear to the total original consideration of the subcontract. In case the total work actually constructed is less than the specified amount, the time for completion of the subcontract will remain the same as specified herein.

"(c) When conditions at the site of the proposed

work are considered by the Constructor to be unfavorable to its prosecution, the Constructor may order the Subconstructor in writing to suspend work under the subcontract until the Constructor considers that the unfavorable conditions for the prosecution of the work no longer exist. When the work is so suspended, the time allowed for completion will be increased by an amount equal to the time of suspension as determined by the Constructor.

“(d) If the Subconstructor fails to perform the work at a rate satisfactory to the Constructor, as specified in subsection (a) above by reason of delays in the delivery of materials or supplies essential to such performance, because of war priorities, or, because of conditions existing through no fault or negligence of the Subconstructor, he may be excused for such failure upon the presentation to and the approval by the Constructor of a written statement setting forth distinctly the cause for such failure.

“(e) In case time for completion of the work is increased due to any of the causes specified herein, it is [4] distinctly understood and agreed that the Subconstructor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered and the Constructor will not be liable for any costs or expenses incurred by the Subconstructor as a result of the increased time for completion of the Subcontract.

“(f) Inasmuch as the provisions of the subcontract documents relating to the time for and the rate

of performance of the work and the time for completion of the same are inserted for the purpose of enabling the United States Government to proceed with the construction of the Sunflower Ordnance Works in accordance with its predetermined program of War Effort, such provisions are of the essence of the subcontract.

“(g) No liquidated damages are provided for under the specifications nor will such damages be provided for in the subcontract.”

5. That on the signature page of said contract, and as a part thereof, a clause provides, as follows:

“This contract is signed and executed by the Power Service Corporation without any intent on the part of the Corporation to abandon or waive any right which it may have to submit, prove, and collect damages by reason of the late delivery of materials notwithstanding the provisions of Par. 1-05 of the specifications.”

6. That as an inducement to plaintiff to submit a bid of \$448,000, based upon an estimate that the contract could be completed within 120 days, and as an inducement to plaintiff to enter into the contract above described, the defendant, by and through his agents, employees and representatives, orally assured and represented to the plaintiff that “nearly all” of the materials required for the work were then stored [5] in Power House No. 1 at Sunflower Ordnance Works, Johnson County, Kansas, or in warehouses adjacent thereto, and that plaintiff would be able at once to commence and proceed, without delay, so far as the availability of ma-

terials was concerned, in the performance of said contract, so as to enable the plaintiff to complete the installation of said boilers within 120 days after commencement thereof, by reason of which defendant thereupon became obligated to furnish all materials for the construction of said boilers in time to avoid any delay to plaintiff in the performance of its contract.

7. That plaintiff received notice from the defendant to proceed with the performance of said contract on July 13, 1944, and thereafter, within the time required by said contract, entered into performance thereof; that at all times since plaintiff was ready, able and willing to perform said contract within the period provided for in said contract of 120 days, to-wit, on or before November 10, 1944.

8. That certain essential construction materials were not in fact in storage as represented to plaintiff, to-wit, certain water wall tubes and water wall headers; that such materials were not obtained by defendant, or made available to plaintiff, in conformity with the specifications annexed to the contract, at the time or times when the same were required for the orderly and efficient performance of said contract, or at the time required by or under the construction schedule filed with the defendant by plaintiff, but were furnished by defendant at intervals of from 16 to 41 days late, as a direct consequence of which plaintiff was delayed in the performance of said contract for a period of 39 days, to-wit, until December 19, 1944.

9. That during said 39 days plaintiff was re-

quired to, [6] and did, maintain an entire construction organization at the above-named project, to pay the salaries and expenses of its supervisory personnel, to rent certain contractor's equipment for an additional period of 39 days, by reason of all of which plaintiff has been damaged in the sum of Thirty-four Thousand Three Hundred Forty-three Dollars (\$34,343.00).

10. That the defendant has stated, asserted and claimed, and now asserts and claims, that he will not pay plaintiff said damages, or any part thereof, for the reason that his failure to furnish said materials, as and when required under the construction schedule, did not delay plaintiff in the performance of its contract; that defendant further claims that in any event the contract specifically provides that he is not liable for damages to plaintiff resulting from delays on his part in furnishing materials as and when required under the construction schedule.

11. Plaintiff further alleges that by reason of the above and foregoing the defendant is making claims adverse and prejudicial to plaintiff's claim for damages on account of the defendant's breaches of said contract as herein alleged; that it is necessary for the protection of the rights of plaintiff to secure a declaratory judgment concerning the construction of said contract, as written, as to whether or not the defendant has breached his contract, and if so whether or not he is liable in damages, and, if so liable, to secure coercive relief in the form of a judgment for the amount of such damages.

12. Wherefore, plaintiff prays that the Court declare and by its decree determine:

(a) Whether or not the delays of the defendant, if any, in making available for installation certain water wall tubes and headers, in conformity with the specifications, [7] constitute breaches of said contract between the parties.

(b) Whether or not the defendant is liable under said contract for damages because of such delays, if any, in furnishing said materials.

(c) Such other and further relief to which plaintiff may be entitled or which may, to the court, seem just and proper.

13. Plaintiff further prays that if the above and foregoing declaration be in its favor, that the Court award plaintiff a judgment for its damages in the sum of Thirty Four Thousand Three Hundred Forty Three Dollars (\$34,343.00), or such part thereof as may be established by the evidence, and for its costs herein incurred, against the defendant.

Count II.

1. If the Court, under Count I, declares and determines by its judgment that under the contract, as written, plaintiff is not entitled to damages under the allegations contained in said Count, then, for the purpose of stating a second cause of action against the defendant, plaintiff hereby repeats all of the facts recited in Paragraphs 1 to 9, inclusive, of Count I, and prays that said facts be taken as a part of this second cause of action to avoid unnecessary prolixity in this petition.

2. Plaintiff states that at the time of making and entering into said contract, it was represented by the defendant, and understood between the plaintiff and the defendant, and their agents and representatives, that all essential materials required for the installation of said boilers were then in storage at the project, so as to enable plaintiff to complete the installation within the time required by the contract, or that if such materials were not so available then in that event that defendant should respond in [8] damages to plaintiff for any delays caused by the failure of the defendant to furnish said materials as and when required under the construction schedule, and that each of the parties contracted with the other upon the belief that such damages would be incurred and that they should be paid if delays occurred because of failure to furnish materials when required, but that when said contract was reduced to writing it was erroneously written in that it did not specifically provide for the payment of damages on account of delays caused by the defendant in the delivery of materials.

3. That in the performance of said contract, commencing July 18, 1944, both parties hereto construed the contract, as written, to authorize the payment by defendant to plaintiff of any damages incurred on account of delays resulting from the late delivery of materials required in the performance of said contract.

4. Plaintiff further states that said contract was incorrectly written by the defendant, or by his agents and representatives who prepared the same,

in that it did not express the mutual intention of the parties, but was executed by the parties under a mutual mistake and belief that the contract, as written, provided that defendant would pay plaintiff any damages caused by the late delivery of materials by the defendant.

5. That in order to make said contract provide for the payment of damages on account of the late delivery of materials by defendant, the special clause on the signature page should be stricken out and Clause 1-05(e) of the Specifications should be amended by inserting thereafter the following clause:

“Provided, however, that if any delays are encountered and are caused by the failure of the [9] Constructor to deliver materials to the site of the project, as herein provided, for use by the Subconstructor at the times required by or under its construction schedule filed with the Constructor, the Constructor agrees to pay to the Subconstructor such damages as it may suffer by reason of such delay.”

6. Wherefore, plaintiff prays the decree of this court directing and compelling reformation of this contract and that the same be reformed to conform to the agreement between the plaintiff and the defendant and to express the true intention and agreement of the parties, and that said contract be reformed in the following respects, to-wit:

(a) That the special clause appearing on the signature page be stricken from the contract.

(b) That immediately following the word "Sub-contract," in the last line of sub-paragraph (e) in Paragraph 1-05 of the Specifications, there be added the following sentence:

"Provided, however, that if any delays are encountered and are caused by the failure of the Constructor to deliver materials to the site of the project, as herein provided, for use by the Subconstructor at the times required by or under its construction schedule filed with the Constructor, the Constructor agrees to pay to the Subconstructor such damages as it may suffer by reason of such delay."

Plaintiff further prays the Court for such other and further relief as to the Court may seem just and proper.

Count III.

1. And, if the Court, under Count I, declares and [10] determines that under the contract as written plaintiff is not entitled to damages for delays in the delivery of materials, and if the Court reforms said contract as prayed for in Count II, then, for the purpose of stating a third cause of action against the defendant, plaintiff hereby repeats all of the facts recited in Paragraphs 1 to 9, inclusive, of Count I, and prays that the same facts may be taken as a part of this third cause of action to avoid unnecessary prolixity in this petition.

2. That by the terms of said contract, if corrected and reformed as prayed for in Count II of this petition, the defendant further agreed that if

any delays were encountered and caused by failure of the defendant to deliver materials at the site of the project, for use by the plaintiff at the time required by or under its construction schedule filed with the defendant by plaintiff, that the defendant would pay plaintiff such damages as it might suffer by reason of such delays.

3. Plaintiff further states that it has duly performed all of the terms and conditions of said contract required by it to be performed, but that the defendant has breached his contract as alleged in Paragraph 8, Count I, and in that he has further failed to pay plaintiff its damages of Thirty-Four Thousand Three Hundred Forty-three Dollars (\$34,343.00), or any part thereof, in accordance with the terms of said contract if and as reformed, and that said sum, with interest from December 19, 1944, at the rate of 6% per annum, is now due the plaintiff.

4. Wherefore, plaintiff prays judgment against the defendant in the sum of Thirty-Four Thousand Three Hundred Forty-Three Dollars (\$34,343.00), with interest thereon at the rate of 6% per annum from December 19, 1944, and for its [11] costs.

/s/ LANCIE L. WATT,

/s/ CHARLES C. SHAFER, JR.,

Attorneys for Plaintiff.

[Endorsed]: Filed June 19, 1946. [12]

EXHIBIT A

L. S. Subcontract Form No. 1. (For use under a F. F. Subcontract for construction of plant).

L. S. Subcontract No. 5. F. F. Construction Subcontract No. 5. Principal Contract. No. W-461-eng-10274.

LUMP SUM
CONSTRUCTION SUBCONTRACT
WAR DEPARTMENT

Constructor: W. E. Joslin, doing business as Cory-Joslin and Macnsons.

Address: Box 36, Kansas City, Missouri.

Subconstructor: Power Service Corporation.

Address: 711 Wesley Temple Building, Minneapolis 4, Minnesota.

Amount: \$448,000.00.

Subcontract for: Complete Erection of Boilers in Power House No. 1.

At Sunflower Ordnance Works, Johnson County, Kansas.

41/3036 [13]

This Subcontract, entered into this eleventh day of July 1944 by W. E. Joslin, an individual of the City of San Francisco in the State of California, doing business under the firm name and style of Cory-Joslin and Macnsons, hereinafter called the "Constructor", with offices at the Sunflower Ordnance Works in Johnson County, Kansas, and Power Service Corporation, a corporation organized and existing under the laws of the State of

Exhibit A—(Continued)

Minnesota, within principal offices in Minneapolis, Minnesota, hereinafter called the "Subconstructor."

Whereas, the Constructor has heretofore, to wit, on the first day of September, 1942, entered into a contract, hereinafter called the Construction Subcontract, with Wm. S. Lozier, Inc.-Broderick and Gordon, hereinafter called the Architect-Engineer-Manager (brevity called the "A-E-M") to construct for the "A-E-M" a manufacturing plant identified and designated as the Sunflower Ordnance Works, at or near Eudora, but located in Johnson County, Kansas, the following work: The installation of Plumbing, Heating and Ventilation (excepting sheet metal work in connection therewith).

Whereas, the parties hereto have agreed that the subconstructor shall for and in the stead of the Constructor fulfill and perform such part of said subcontract as hereinafter set forth; and

Whereas, the subconstructor has read and is familiar with each and every part of said subcontract, and the respective rights, powers, benefits, obligations and liabilities of the United States of America, hereinafter called the Government, and the Constructor and the A-E-M thereunder.

Now Therefore, This Subcontract Witnesseth: that the parties hereto do mutually agree as follows: [14]

Article I

(a) The work shall be commenced within five (5) calendar days after the date of receipt of notice to proceed, and shall be completed in accordance

Exhibit A—(Continued)

with Paragraph 1-05 of the "General Provisions and Specifications."

(b) The Subconstructor shall be required to do the following work:

The work shall include the furnishing of all plant, equipment, labor and materials (excepting materials to be furnished and/or work to be performed by the Constructor and/or others as specifically provided for in the General Provisions and Specifications) and perform all work necessary for the complete erection of Boilers in Power House Number 1, at the Sunflower Ordnance Works, Johnson County, Kansas, in strict accordance with plans and specifications and as directed in writing by the Constructor for and in consideration of the Lump Sum price of Four Hundred Forty Eight Thousand Dollars and No Cents (\$448,000.00); in strict accordance with the specifications, schedules and drawings, all of which are made a part hereof and designated as follows: Specifications entitled "General Provisions and Specifications for Complete Erection of Boilers in Power House No. 1 at Sunflower Ordnance Works, Johnson County, Kansas", Addendum No. 1 thereto, dated 4 July 1944; Addendum No. 2 thereto, dated 5 July 1944; Addendum No. 3, dated 5 July 1944 and plans listed in paragraph 1-03 of those specifications, as amended by the foregoing addenda and in strict accordance with such drawings and written directions in explanation of details and modifications

Exhibit A—(Continued)

which may be prepared by the Constructor prior to and during construction and delivered to the Subconstructor. [15]

Article II.

In the performance of this subcontract, the Subconstructor binds himself to the Constructor and to the A-E-M and to the Government to comply fully with all the undertakings and obligations of the Constructor, excepting such as do not apply to the Subconstructor's work, as are set forth in the construction subcontract with which provisions the Subcontractor is familiar and which is hereby adopted and made a part of this subcontract.

Article IV.

1. Neither this subcontract nor any interest therein shall be assigned or transferred, except as otherwise provided in this Article and except that the whole or any part thereof is assignable to the A-E-M or the Government; and no part of this contract shall be sub-let except (1) under unusual circumstances, (2) upon a fixed-price basis, and (3) with the express written approval of the Contracting Officer and A-E-M.

2. Claims for monies due or to become due to the Subconstructor from the Constructor arising out of this subcontract may be assigned to any bank, trust company or other financing institution, including any Federal lending agency. Any such assignment shall cover all amounts payable under this subcontract and not already paid, and shall not

Exhibit A—(Continued)

be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing; Provided that, in the event of any such assignment, the assignee thereof shall file written notice of the assignment together with a true copy of the instrument of assignment with:

(a) the Constructor.

(b) The General Accounting Office, [16]

(c) the Contracting Officer who approved this subcontract,

(d) the surety or sureties upon the bond or bonds, if any, in connection with this subcontract, and

(e) The Disbursing Officer designated to make payments under the principal contract.

3. Any claim under this subcontract which may be assigned may be subject to further assignment to a bank, trust company or other financing institution, including any Federal lending agency, and to similar further assignment: Provided that, any such assignee shall file written notice of the further assignment together with a true copy of the instrument of further assignment with the Subconstructor and also as provided in 2 above with respect to original assignment.

4. No assignee shall divulge any information concerning the subcontract or concerning matters contained therein, except to those persons authorized by the Contracting Officer.

Exhibit A—(Continued)**Article X.**

The Subconstructor shall fully cooperate with other subconstructors, subcontractors, or contractors engaged in Government work at the locality covered by the construction subcontract and shall not interfere with the performance of their work. In case of conflict which cannot be adjusted by the Constructor the necessary coordination shall be as directed by the Contracting Officer who executed the construction subcontract, or his duly authorized representative.

Article XI.

Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of this subcontract, the Subconstructor will immediately give notice thereof to the Constructor.

Article XII.

The Subconstructor, in performing the work required by [17] this subcontract, shall not discriminate against any employee or applicant for employment because of race, creed, color or national origin.

Article XVII.

The following changes were made in this subcontract before it was signed by the parties hereto:

1. The following articles were added:

Exhibit A—(Continued)

“Article XVIII.”

“The subconstructor shall not employ any person undergoing sentence of imprisonment at hard labor.”

“Article XIX.”

“1. Prompt Payment of Wages. The subconstructor, or his subcontractor, shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at the time of payment, computed at wage rates not less than those determined by the Secretary of Labor for the work herein specified, regardless of any contractual relationship which may be alleged to exist between the subconstructor or his subcontractors and such mechanics and laborers.”

“2. Overtime. The subconstructor shall compensate laborers and mechanics for all hours worked by them in excess of eight hours in any one calendar day at a rate not less than one and one-half times the basic rate of pay of such laborers and mechanics and shall include a stipulation in each subcontract hereunder that laborers and mechanics will be paid at a rate not less than one and one-half times their basic rate of pay for all hours worked by them in excess of eight hours in any one calendar day.”

“3. Withholding Accrued Funds. There may be withheld from the subconstructor so much of the

Exhibit A—(Continued)

accrued payments as [18] may be considered necessary by the Constructor to pay to laborers and mechanics employed by the subcontractor or any subcontractor under this subcontract, the difference between the rates of wages required by this subcontract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the subcontractor, his subcontractor, or their agents.”

“4. Right of Termination for Failure to Pay Specified Wages. In the event it is found by the Constructor that any laborer or mechanic employed by the subcontractor or any subcontractor under this subcontract, directly on the site of the work covered by this subcontract has been or is being paid a rate of wages less than the rate of wages required by this subcontract to be paid as aforesaid, the Constructor may, by written notice to the subcontractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the subcontractor and its sureties shall be liable to the Constructor for any excess costs occasioned the Constructor thereby.”

“5. Affidavit Under Kick-Back Act. a. The subcontractor shall furnish to the Constructor within seven (7) days after the regular payment date of each and every weekly payroll, an affidavit in the form prescribed by regulations issued by the Sec-

Exhibit A—(Continued)

retary of Labor and published in the Federal Register of March 1, 1941, 6 F.R. 1211, or any modifications thereof pursuant to the Act of June 13, 1934, 48 Stat. 948 (U. S. Code Title 40, Section 276 b and c) sworn to by the subconstructor or any subcontractor concerned under this subcontract or by the authorized officer or employee of the subconstructor or its subcontractor supervising such payment, [19] to the effect that each and every person employed on the work has been paid in full the weekly wages shown on the payroll covered by the affidavit; that no rebates have been or will be made either directly or indirectly to or on behalf of the Subconstructor or its subcontractor from the full weekly wages earned as set out on such payrolls; and that no deductions, other than permissible deductions as defined in said regulations pursuant to said Act of June 13, 1934, and as described in said affidavit have been or will be made, either directly or indirectly, from the full weekly wages earned as set out in such payroll.”

“b. The subconstructor shall comply with all applicable requirements of said regulations of the Secretary of Labor under the Act of June 13, 1934, and the requirements of this Article of the subcontract shall be subject to all applicable provisions of such regulations.”

2. The following deletions and substitutions were made:

(a) Article III was entirely deleted, and the following Article substituted in lieu thereof:

Exhibit A—(Continued)

“Article III.”

“If the subconstructor refuses or fails to prosecute the work, or any separable part thereof with such diligence as will insure its completion within the time specified in Article I or any extension thereof, or fails to complete said work within such time, the Constructor may, by written notice to the subconstructor, terminate its right to proceed with the work or such part of the work as to which there has been delay. In such event, the Constructor may take over the work, prosecute the same to completion, by contract or otherwise, and the subconstructor and its sureties shall be liable to the Constructor for any excess cost occasioned the Constructor thereby. If the subconstructor’s right to proceed is so terminated, the Constructor may take possession [20] of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor. Provided, that the work of the subconstructor to proceed shall not be terminated under this Article, because of any delays in the completion of the work due to causes beyond the control and without the fault or negligence of the subconstructor, including, but not restricted to, acts of God, or of the Public enemy, acts of the Constructor, acts of the Government (including, but not restricted to any preference, priority, or allocation order), acts of other contractors or subcontractors in the performance of contracts or subcontracts

Exhibit A—(Continued)

with the Government or the Constructor, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of the subconstructor's subcontractors due to such causes. In which event the contracting officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal within 30 days, by the contractor to the Secretary of War or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

(b) Article V was entirely deleted and the following Article substituted in lieu thereof:

“Article V.”

“(a) In consideration of the Subconstructor's undertakings hereunder, the Subconstructor shall receive payment for work performed at the lump sum amount set forth in Article I hereof, which shall constitute full compensation [21] for the performance by the subconstructor of the work and services authorized herein, unless otherwise provided in the specifications.

“(b) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or

Exhibit A—(Continued)

as soon thereafter as practicable, on estimates made and approved by the Constructor. In preparing estimates, the material delivered on the site and preparatory work done may be taken into consideration.

“(c) In making such partial payments, there shall be retained ten per cent (10%) of the estimated amount until final completion and acceptance of all work covered by the subcontract; provided, however, That the Constructor, at any time after fifty per cent (50%) of the work has been completed, if he finds that satisfactory progress is being made may make any of the remaining partial payments in full; and provided, further, that on completion and acceptance of each separate building, vessel, public work, or other division of the Subcontract on which the price is stated separately in the Subcontract, payment may be made in full including retained percentages thereon, less authorized deductions.

“(d). In the event the Contractor exercises any of its reserved rights under the principal contract to which this subcontract is made subject, an equitable adjustment shall be made in the amounts due under this subcontract as of the day of the exercise of such reserved rights, in accordance with Article IX hereof.”

c. Article VI was entirely deleted and the following Article substituted in lieu thereof:

Exhibit A—(Continued)

“Article VI.”

“All disputes concerning questions of fact arising under this subcontract shall be decided by the Contracting Officer, [22] whose decision shall be in writing, subject to appeal by either party hereto within 30 days from the receipt of the Contracting Officer’s decision to the Chief of Engineers whose decision shall be final and conclusive upon the parties hereto. Notwithstanding this provision, the subcontractor shall diligently proceed with the work as directed.

(d) Article VII was entirely deleted and the following Article substituted in lieu thereof:

“Article VII.”

“Insurance coverages under this subcontract shall be furnished by the A-E-M in accordance with Paragraph 1-25 of the General Provisions of Specifications.”

(e) Article VIII was entirely deleted, and the following Article substituted in lieu thereof:

“Article VIII.”

“(a) In order to protect the life and health of its employees in the performance of this subcontract, the subcontractor will comply with all pertinent provisions of the “Safety Requirements in Excavation - Building - Construction” approved by Chief of Engineers December 16, 1941, revised March 15, 1943 (a copy of which is on file in the Office of the Contracting Officer), and as may be amended, and will take or cause to be taken such

Exhibit A—(Continued)

additional measures as the Contracting Officer may determine to be reasonably necessary for this purpose. The subcontractor will maintain an accurate record of, and will report to the Contracting Officer, in the manner and on the forms prescribed by the Contracting Officer, all cases of death, occupational disease and traumatic injury arising out of or in the course of employment on work under this subcontract.”

“(b) The Contracting Officer will notify the subcontractor of any noncompliance with the foregoing provisions [23] and the action to be taken. The subcontractor shall, after receipt of such notice, immediately correct the conditions to which attention has been directed. Such notice when served on the subcontractor or his representatives at the site of the work shall be deemed sufficient for the purpose aforesaid.

“(c) If the subcontractor fails or refused to comply promptly, the Contracting Officer may issue an order stopping all or any part of the work. When satisfactory corrective action is taken, a start order will be issued.”

(f) Article IX was entirely deleted and the following Article substituted in lieu thereof:

“Article IX.”

“(a) Subject to the approval of the Contracting Officer, the Constructor may, at any time, by written order, and without notice to the sureties, if any, make changes in the drawings and/or specifica-

Exhibit A—(Continued)

tions of this subcontract and within the general scope thereof. If such changes cause a material increase or material decrease in the amount due under this subcontract, or in the time required for its performance, an equitable adjustment shall be made and the subcontract shall be modified in writing accordingly.

“(b) In the event this subcontract is terminated before the work called for hereunder is completed, the Subconstructor shall be paid at the lump sum amount herein set forth for the actual quantity of work which has been completed as of the date of such termination; provided, however, that should such termination take place before the completion of the minimum quantity of work, as such minimum is defined in the specifications, the subconstructor shall be paid on an equitable basis in accordance with the terms of paragraph (a) of this Article. [24]

“(c) If the subconstructor and the Constructor fail to agree upon an equitable adjustment of the amount of the additions or deductions hereunder, the dispute shall be determined as provided in Article VI.

(g) Article XII was entirely deleted and the following Article substituted in lieu thereof:

“Article XIII.”

The matters set forth in Paragraphs 1-10, 1-05 and 1-07 of the “General Provisions and Specifications” and in Article III of the subcontract, shall

Exhibit A—(Continued)

govern the work under this subcontract with respect to the progress schedule, the progress of the work thereunder, the prosecution of the work, and the right of the Constructor to terminate the Substructor's right to proceed with the work for failure to maintain progress."

(h) Article XIV was entirely deleted and the following Article substituted in lieu thereof:

"Article XIV."

1. Payment Bond—The subconstructor agrees to furnish a payment bond with good and sufficient surety acceptable to the Government for the protection of persons furnishing material or labor in connection with the performance of the work under this agreement on U. S. Standard Form in the penal sum of \$224,000.00.

2. Performance Bond—The subconstructor further agrees to furnish a performance bond with good and sufficient surety or sureties acceptable to the Government in connection with the performance of work under this agreement on U. S. Standard Form in the penal sum of \$44,800.00.

(i) Article XV was entirely deleted and the following Article substituted in lieu thereof: [25]

"Article XV."

"The term 'Chief of Engineers' shall include his duly authorized representative, as the case may be, other than the Contracting Officer.

"The term 'Contracting Officer' refers to the Contracting Officer who approved this subcontract or to his duly appointed successor."

Exhibit A—(Continued)

(j) Article XVI was entirely deleted and the following Article substituted in lieu thereof:

“Article XVI.”

“This subcontract shall be subject to the written approval of the A-E-M and the Contracting Officer, and shall not be binding until so approved.”

(k) The following article was added as Article XX thereof:

“Article XX.”

Renegotiation — (a) This Subcontract shall be deemed to contain all the provisions required by subsection (b) of the Renegotiation Act as amended by Section 701 of the Revenue Act of 1943 (Public Law No. 235, 78th Congress, enacted February 25, 1944).

In Witness Whereof, the parties hereto have executed this subcontract as of the day and year first above written.

CORY-JOSLIN AND
MACNSONS,

By F. V. WEDLECK.

Witnesses, as to Constructor:

KARL V. VASICEK,
J. M. ROBINSON.

POWER SERVICE CORP.,
By D. B. FEGLES,
President.

Approved September 7, 1944.

Exhibit A—(Continued)

Witnesses, as to Subconstructor:

EDNA E. VANSELOW,
P. C. GAFFNEY.

Approved 11 September 1944.

WM. S. LOZIER, INC.—
BRODERICK AND GORDON.By ARTHUR A. DUKELOW,
/s/ JAMES E. MATTHEWS,
Major, Corps of Engineers Resident Engineer and
Contracting Officer. [26]

This contract is signed and executed by the Power Service Corporation without any intent on the part of the Corporation to abandon or waive any right which it may have to submit, prove, and collect damages by reason of the late delivery of materials notwithstanding the provisions of Par. 1-05 of the specifications.

D.B.F.

F.V.W.

A.A.D.

JEM

CERTIFICATE OF CORPORATE
AUTHORITY.

I, Anne Howard certify that I am the acting secretary of the corporation named as the Subconstructor herein; that D. B. Fegles who signed this subcontract on behalf of the Subconstructor was then President of said corporation; that said

Exhibit A—(Continued)

subcontract was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

(Corporate Seal)

ANNE HOWARD,

711 Wesley Temple Bldg., Minneapolis, Minn.

July 11, 1944. [27]

June 20, 1944

Sunflower Ordnance Works

Johnson County, Kansas

General Provisions and Specifications for Complete Erection of Boilers in Power House No. 1 at Sunflower Ordnance Works Johnson County, Kansas.

Section I

General Provisions

1-01. Location. The site of the proposed work is at the Sunflower Ordnance Works, Johnson County, Kansas.

1-02. Work to be done. This work shall include the furnishing of all plant, equipment, labor and materials (excepting materials to be furnished and/or work to be performed by the Constructor and/or other as specifically provided for in the General Provisions and Specifications) and perform all work necessary for the complete Erection of Boilers in Power House Number One at the

Exhibit A—(Continued)

Sunflower Ordnance Works, Johnson County, Kansas, in strict accordance with plans and specifications and as directed in writing by the Constructor.

1-03. (a) The work shall conform to drawings designated as follows: * * *

(b) The work shall conform to all drawings relating thereto, as may be furnished by the Constructor prior to the opening of proposals and to such drawings in explanation of details or minor modifications which may be furnished from time to time during construction, including such minor modifications as the Constructor may consider necessary on account of conditions found during prosecution of the work.

(c) Prior to prosecution of the work the Subconstructor shall check all drawings and shall immediately report all [28] errors, discrepancies, and/or omissions discovered therein to the Constructor. Any adjustments made by the Subconstructor without prior approval shall be at his own risk and the settlement of any complications arising from such adjustments shall be made by the Subconstructor at his own expense.

(d) Parts and details required for complete and satisfactory construction and not fully indicated on the drawings furnished by the Constructor will be detailed by the Constructor in accordance with the best modern practice.

(e) These drawings shall be complete, giving all required information. No affected material shall be

Exhibit A—(Continued)

furnished or work done pending approval of these drawings. The subconstructor shall submit three (3) prints of each of such detailed drawings with a carrying letter to the Constructor.

(f) Decisions on these drawings, either approval or disapproval, will be given by letter or telegram within five (5) calendar days after receipt thereof by the Constructor. In the event that action on the drawings is not taken within five (5) calendar days after receipt thereof the Constructor, the time allowed for completion of the subcontract will be increased as provided in subparagraph 1-05 (b). Drawings returned for correction shall be resubmitted for approval as provided above.

(g) After approval, the Subconstructor shall furnish the Constructor with eight (8) prints of each approved drawing. All of these approved drawings will form a part of the subcontract, and will be referred to in the specifications as "approved plans" and/or "approved drawings." * * *

(j) The specifications give, in general, the character of work required, methods of construction and material to be used. In the subcontract, the specifications and plans are to be interpreted as mutually explanatory and supplementary, [29] and therefore, any feature shown on one and not on the other, shall have the same force and effect as if shown on both.

(k) It is the spirit and intent of these specifications and plans to secure for the constructor the

Exhibit A—(Continued)

work described, complete in every respect, and the general conditions thereof shall be complied with, whether items are specifically mentioned or not.

1-04. Quantity. (a) The quantity of work to be performed is the complete erection of boilers in Power House Number One including the furnishing of all plant, equipment, labor and materials (excepting materials to be furnished and/or work to be performed by the Constructor and/or others as specifically provided for in the General Provisions and Specifications) as specified in Paragraph 1-02. The lump sum offer price for the entire work will be the basis of comparison of the offers. Within the limits of the available funds, the Subconstructor will be required to complete the entire work specified in this paragraph, be it more or less than the amount herein specified subject to the provisions of paragraph 1-12 of the specifications.

1-05. Commencement, Prosecution and Completion. (a) The Subconstructor will be required to commence work under the subcontract within five (5) calendar days after the day of receipt by him of Notice to Proceed and will be required to prosecute said work faithfully and energetically and to complete the work within one hundred twenty (120) calendar days, the time to be computed from said date of receipt of Notice to Proceed, except as provided hereafter in this paragraph.

(b) In the event the total payments for work

Exhibit A—(Continued)

actually constructed by the Subconstructor under the subcontract exceed the original amount of the subcontract, the time for [30] completion of the subcontract will be extended in the proportion that payments for work in excess of the original amount of the subcontract bear to the total original consideration of the subcontract. In case the total work actually constructed is less than the specified amount, the time for completion of the subcontract will remain the same as specified herein.

(c) When conditions at the site of the proposed work are considered by the Constructor to be unfavorable to its prosecution, the Constructor may order the Subconstructor in writing to suspend work under the subcontract until the Constructor considers that the unfavorable conditions for the prosecution of the work no longer exist. When the work is so suspended, the time allowed for completion will be increased by an amount equal to the time of suspension as determined by the Constructor.

(d) If the Subconstructor fails to perform the work at a rate satisfactory to the Constructor, as specified in section (a) above by reason of delays in the delivery of materials or supplies essential to such performance, because of war priorities, or, because of conditions existing through no fault or negligence of the Subconstructor, he may be excused for such failure upon the presentation to and the approval by the Constructor of a written state-

Exhibit A—(Continued)

ment setting forth distinctly the causes' for such failure.

(e) In case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the Subconstructor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered, the Constructor will not be liable for any costs or expenses incurred by the Subconstructor as a result of the increased time for completion of the Subcontract. [31]

(f) Inasmuch as the provisions of the subcontract documents relating to the time for and the rate of performance of the work and the time for completion of the same are inserted for the purpose of enabling the United States Government to proceed with the construction of the Sunflower Ordnance Works in accordance with the predetermined program of War Effort, such provisions are of the essence of the subcontract.

(g) No liquidated damages are provided for under the specifications nor will such damages be provided for in the subcontract.

1-06. If the subconstructor refuses or fails to prosecute the work or any separable part thereof in accordance with the terms and conditions of Paragraph 1-05, the Constructor may by written notice to the Subconstructor terminate his right to proceed with the work or such part of the work involved by such refusal or failure. In such event,

Exhibit A—(Continued)

the Constructor may take over the work and prosecute the same to completion by contract or otherwise, and in so doing, may take over and use for that purpose the Subconstructor's equipment, plant and materials. Any excess cost to the Constructor above the subcontract price for such work or such part of the work, will be charged to the Subconstructor, who will be liable for the same.

1-07. Sundays, Holidays and Nights. Work on Sundays, Holidays and nights will be at the option of the Subconstructor, however, when the Subconstructor elects to work at such times, notice of his intention to do so shall be given to the Constructor within a reasonable time in advance thereof, (subject, however, to the provisions of paragraph 1-10-b).

1-08. Payments. (a) Payments will be made monthly based upon the estimated percentage of completion of the work as determined by the Constructor and not included for payment [32] in any previous estimate covering those portions of the work completed in accordance with the specifications. In making partial payments, ten percent will be retained from each payment until full completion and acceptance of all work covered by the subcontract, provided that the Constructor, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full. The amount so retained, less

Exhibit A—(Continued)

any proper deductions, will be paid to the Subconstructor on completion and final acceptance of all work under the subcontract.

(b) Work not done in order of procedure as instructed by the Constructor will not be included in estimates or payment until it is properly incorporated into the work as a whole.

1-09. Railroad Facilities for hauling freight are available via Atchison, Topeka & Santa Fe Railroad.

1-10. Organization, Plant and Progress. (a) The Subconstructor shall within seven (7) days after receipt of the notice to proceed, prepare and submit to the Constructor for approval a practicable and feasible schedule showing the order in which the Subconstructor proposes to carry on the work, the dates on which he will start the several salient features (including procurement of plant and equipment), and the contemplated dates for completing the same. The schedule shall be in the form of a progress chart of suitable scale so as to indicate appropriately the percentage of work scheduled for completion at any time. The subconstructor shall enter the actual progress at the end of each week, and shall immediately deliver to the Constructor three blue print copies of the same. [33]

(b) The Subconstructor shall furnish sufficient forces, construction plant and equipment, and shall work such hours, including night shifts, overtime operations, and Sunday and holiday work as may

Exhibit A—(Continued)

be necessary to insure the prosecution of the work in accordance with the approved progress schedule. If, in the opinion of the Constructor, the Subconstructor falls behind the progress schedule, the Subconstructor shall take such steps as may be necessary to improve his progress and the Constructor may require him to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, all without additional cost to the Constructor.

(c) Failure of the Subconstructor to comply with the requirements of the Constructor under this provision shall be grounds for the determination of the Constructor that the Subconstructor is not prosecuting the work with such diligence as will insure completion within the time specified; and when such determination has been made, the Constructor may terminate the Subconstructor's right to proceed with the work or such part of the work as to which there has been delay, pursuant to Article III of the subcontract.

1-11. Claims, Protests and Appeals. If the Subconstructor considers any work demanded of him to be outside the requirements of the subcontract, or if he considers any action or ruling of the Constructor or of the inspectors to be unfair, the Subconstructor shall without undue delay, upon such demand, action or ruling, submit his protest thereto in writing to the Contracting Officer stating clearly and in detail the basis of his objections.

Exhibit A—(Continued)

The Contracting Officer shall thereupon promptly investigate the complaint and furnish the Subconstructor his decision thereon in writing. If the Subconstructor is not satisfied with the decision of the [34] Contracting Officer, he may, within thirty (30) days, appeal in writing to the Chief of Engineers, whose decision, or that of his duly authorized representative, shall be final and binding upon the parties to the subcontract, Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the Contracting Officer shall be final and conclusive. All appeals from the decisions of the Contracting Officer authorized under the subcontract shall be addressed to the War Department, Chief of Engineers, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the Subconstructor bases his claim for relief and should be presented to the Contracting Officer for transmittal within the time provided therefor in the subcontract.

Provided, however, in case of dispute or disagreement within the meaning of this paragraph, the Subconstructor shall first submit his protest in writing to the Constructor, stating clearly and in detail the basis for his protest. The Constructor will thereupon investigate the complaint and furnish the Subconstructor its written decision thereon. If the Subconstructor is not satisfied with the

Exhibit A—(Continued)

decision of the Constructor he may then proceed as outlined herein.

1-12. Modifications. The right is reserved to make such changes in the execution of the work to be done under these specifications as in the judgment of the Constructor may be necessary or expedient to carry out the intent of the subcontract, provided, that the cost to the Subconstructor of doing the work will not be increased thereby; and no increase in price over the subcontract price will be paid to the Subconstructor of such changes. No change which will materially affect the cost of doing the work will be made, and no [35] greater or less price than the subcontract price will be paid except upon formal written agreement between the parties, as provided in the form of the subcontract to be entered into. (See Article IX of the subcontract).

* * *

1-29. Approval. The subcontract shall be subject to the written approval of the Architect-Engineer-Manager and the Contracting Officer, and shall not be binding until so approved. * * *

Section II—Conduct of Work.

2-01. Order of Work. (a) The work shall be carried on at such locations and in such order or procedure as may be found necessary by the Constructor. The location and limits of the work to be done will be plainly indicated by the Constructor.

(b) The Subconstructor will be required to conduct the work in such manner that other work in

Exhibit A—(Continued)

progress will not be unduly delayed. He shall cooperate and work harmoniously with other contractors at the site to the end that all of the work may be completed as expeditiously as possible.

(c) The location of the work will be indicated by the Constructor. The grades are indicated on the various drawings. The Subconstructor must lay out his work. He shall be responsible for measurements. He must exercise proper precaution to verify the figures on the drawings before laying out the work and will be held responsible for any errors therein that otherwise might have been avoided. He shall promptly inform the Constructor of any errors or discrepancies he may discover in the drawings and specifications in order that the proper corrections may be made and understood. The work must be carried on systematically and so managed at all times as to secure substantial progress and avoid annoyance and inconvenience. All construction operations [36] must be confined to the limits designated by the Constructor.

Section IV—Technical Provisions.

4-01. Intent of Plans and Specifications. The intent is to prescribe a complete work or improvement which the Subconstructor shall do in full compliance with the plans and these specifications. The Subconstructor shall perform the work in accordance with the lines, grades, typical cross-sections, and dimensions shown on the plans or as modified by written order involving changes or im-

Exhibit A—(Continued)

posed as a result of changed conditions; and he shall furnish, unless otherwise provided in the specifications, plans, or in the Subcontract, all materials, implements, machinery, equipment, tools, supplies, and labor necessary for the prosecution of the work.

4-02. Work Covered by Subcontract Prices. (a) The Subconstructor shall, under the subcontract prices, furnish all labor, materials, tools, equipment, plant and supplies (excepting as the same or any part of the same is to be furnished by the Constructor when so specified) and perform all work required by the subcontract to carry out the subcontract in good faith which contemplates everything completed in first class condition, of good material, with accurate workmanship and proper finish in every respect.

(b) In cases where the subcontract price clause in the specifications relating to the unit price for any item requires that the said unit price cover and be considered compensation for certain work or material essential to the item, this same work or material shall not also be measured or paid for under any other pay item which may appear elsewhere in the specifications. * * *

5-04. Materials Furnished by the Constructor. (a) In general, all materials, equipment and machinery which will [37] actually be incorporated into the permanent construction will be furnished by the Constructor and/or others. Materials and sup-

Exhibit A—(Continued)

plies incidental to the permanent construction, including but not limited to cutting oil, wire, fuel for construction equipment, welding bars, cement grout and concrete, scaffolding, forming temporary bracing and blocking, pipe dope and compound, all erection facilities and equipment etc., will be supplied by the Subconstructor without cost to the Constructor over and above the subcontract price. Fuel for use in testing operating equipment and for putting the plant in operation will be supplied by the Constructor. Materials furnished by the Constructor will be delivered to the Subconstructor at points and in the manner specified. Section VII hereof.

(b) Immediately after starting work under the Subcontract the Subconstructor shall prepare a "list of materials" including accessories and equipment required, and shall check this list against the materials, accessories and equipment stored in or adjacent to the Power House in order that shortages may be immediately determined. Such shortages will then be reported to the Constructor for use in obtaining the balance of materials required for the completed work. Such an inventory will be kept current by the Subconstructor during the progress of the work and the Subconstructor will be held responsible for advising the Constructor of his requirements sufficiently in advance of the time such items will be required to enable procurement without delaying progress.

Exhibit A—(Continued)

(c) Nearly all of the materials required for the work has been stored in Power House No. 1 or in warehouses adjacent thereto. Materials, equipment and machinery which have been stored and which have been subjected to conditions [38] necessitating reconditioning, refinishing, refacing, cleaning, painting, packing (in valves and pumps), and similar work to properly prepare for installation and operation will be reconditioned, refinished etc., by the Subcontract, except however, that such reconditioning, refinishing etc. shall apply only to defects which have resulted from storage and does not include inherent defects in manufacture or materials. Materials, equipment and machinery which have been broken or otherwise damaged beyond use or repair during storage or which have inherent defects in manufacture or material caused through no fault or negligence of the Subcontractor will be replaced by the Constructor without cost to the Subconstructor.

Section 5-A,

Conservation of Critical Materials.

(Omitted)

[39]

[Title of District Court and Cause.]

ANSWER

Comes now W. E. Joslin, an individual doing business as Cory-Joslin and Macnsons, defendant above-named, and answering the petition of the

above-named plaintiff on file herein, admits, denies and alleges as follows:

That said petition, nor any of its counts, state a cause of action.

In answer to the allegations in Count I:

I.

Defendant admits the allegations contained in paragraphs 1, 3, 4 and 5;

II.

Admits that portion of the allegations contained in paragraph 2 down to the last clause thereof commencing with the words "that a copy * * *" etc., and denies the allegations contained in said last clause;

III.

Denies each and every allegation contained in paragraph 6 and in this regard alleges the fact to be that the [40] Specifications referred to speak for themselves and the words therein "nearly all" mean just what they imply and specifically notified and warned plaintiff to govern itself accordingly;

IV.

Admits all of paragraph 7 except the words "ready and willing", which is denied;

V.

Denies each and every allegation contained in paragraphs 8, 9, 10 and 11, except that defendant admits that he refuses to pay the alleged damages claimed by plaintiff or any part thereof, and in this connection defendant denies that plaintiff has been

damaged in the sum of \$34,343.00 or any other sum or amount and further denies that defendant breached his contract with plaintiff, or is liable to plaintiff in any sum whatsoever in the premises.

In answer to the allegations in Count II.

I.

Defendant by this reference incorporates herein his same admissions, denials and allegations hereinabove set forth in answer to paragraphs 1 to 9 inclusive of Count I of plaintiff's Petition and hereby constitutes them his answer to the same respective paragraphs incorporated by reference in paragraph 1 of Count II, to the same extent as though recited at length herein in answer to said respective paragraphs;

II.

Defendant denies each and every allegation contained in paragraphs 2, 3, 4 and 5 and in this regard alleges the facts to be that the contract and specifications referred to and entered into now express without amendment or modification the true intention and agreement of the parties, that there [41] was no understanding at any time between the parties that plaintiff would be entitled to damages for delayed delivery of materials or that the contract or the specifications provided for any such damages or were intended to so provide, and defendant further alleges the facts to be that the contract referred to was entered into by defendant for the benefit of and at the expense of the United States of America and in keeping with the con-

tracting policy of the United States Government said specifications specifically provided that no liquidated damages should be assessed or payable.

In answer to the allegations in Count III:

I.

Defendant by this reference incorporates herein his same admissions, denials and allegations hereinabove set forth in answer to paragraphs 1 to 9 inclusive of Count I of plaintiff's Petition and hereby constitutes them his answer to the same respective paragraphs incorporated by reference in paragraph 1 of Count III, to the same extent as though reiterated at length herein in answer to said respective paragraphs;

II.

Defendant denies each and every allegation contained in paragraphs 2 and 3 as now alleged or hereafter reformed and further denies that plaintiff has suffered damages in any amount whatsoever or is entitled to recover any sum whatsoever by way of damages or otherwise from defendant in the premises.

That as and for a separate defense to said petition and each of its counts defendant further alleges:

I.

That said plaintiff is barred by:

- (a) estoppel, [42]
- (b) release,
- (c) statute of frauds,
- (d) waiver.

Wherefore defendant prays that he be dismissed with his costs incurred herein.

FRANK J. HENNESSY,
United States Attorney.

/s/ WM. P. CAUBU,
/s/ PAUL B. GIBSON,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 3, 1946. [43]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Now comes defendant and by stipulation of counsel for plaintiff and by leave of Court first had and obtained, files this, his amendment to his Answer heretofore filed.

As and for a separate defense to said petition and each of its counts, defendant further alleges:

I.

That there was no consideration to defendant for

the addenda or additional clause to the signature page of the contract of the parties hereto.

/s/ FRANK J. HENNESSY,
United States Attorney.

PAUL B. GIBSON,
W. P. CAUBU,
Attorneys for Defendant.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Mar. 20, 1947. [44]

[Title of District Court and Cause.]

OPINION

March 30, 1948

Lancie L. Watts, 801 Scarritt Building, Kansas City, Missouri, Attorney for the Plaintiff.

Frank J. Hennessy, U. S. District Attorney for the Northern District of California, 422 Post Office Building, San Francisco, Calif.

Rudolph Scholz, Assistant U. S. District Attorney for Northern District of California, 422 Post Office Building, San Francisco, Calif.

Paul B. Gibson, Humboldt Bank Building, San Francisco, Calif., Attorneys for the Defendant.

Clark, District Judge.

This cause involved a claim for damages in the amount of \$34,343.00 for delay in the performance of a construction contract. Plaintiff alleges damages for delay in construction by failure of the defendants to deliver material at the site of the project.

Plaintiff's petition is in three counts.

Count one seeks a declaration of the rights under the contract as written and in alternative, if the construction [45] of the contract be adverse to plaintiff, count two seeks reformation of the contract to make it express the intention of the parties, and count three seeks recovery.

The particular provisions of the contract to be construed which effect the present controversy are as follows:

Article I.

“(a) The work shall be commenced within five (5) calendar days after the date of receipt of notice to proceed, and shall be completed in accordance with paragraph 1-05 of the ‘General Provisions and Specifications.’

“(b) The subconstructor shall be required to do the following work:

“The work shall include the furnishing of all plant, equipment, labor and materials (excepting **materials to be furnished** and/or work to be performed by the constructor and/or others as specifically provided for in the General Provisions and Specifications) and perform all work necessary for the complete erection of Boilers in Power House Number 1, at the Sunflower Ordnance Works, Johnson County, Kansas, in strict accordance with plans and specifications and as directed in writing by the Constructor for and in consideration of the Lump Sum price of Four Hundrey Forty Eight Thousand Dollars and no Cents (\$448,000); in strict accordance with the specifications, schedules and

drawings, all of which are made a part hereof and designated as follows: Specifications entitled 'General Provisions and Specifications for Complete Erection of Boilers in Power House No. 1 at Sunflower Ordnance Works, Johnson County, Kansas',
* * * [46]

Materials to be furnished—(specifications)

"5-04 (a) Material furnished by the Constructor. In general, all materials, equipment and machinery which will actually be incorporated into the permanent construction will be furnished by the Constructor and/or others. Material and supplies incidental to the permanent construction, including but not limited to cutting oil, wire, fuel for construction equipment, welding bars, cement grout and concrete, scaffolding, forming temporary bracing and blocking, pipe dope and compound, all erection facilities and equipment, etc., will be supplied by the Subconstructor without cost to the Constructor over and above the subcontract price. Fuel for use in testing operating equipment and for putting the plant in operation will be supplied by the Constructor. Materials furnished by the Constructor will be delivered to the Subconstructor at points and in the manner specified. Section VII hereof.

"(b) Immediately after starting work under the subcontract the subconstructor shall prepare a 'list of materials' including accessories and equipment required, and shall check this list against the materials, accessories and equipment stored in or adjacent to the Power House in order that shortages may be immediately determined. Such shortages

will then be reported to the Constructor for use in obtaining the balance of materials required for the completed work. Such an inventory will be kept current by the Subconstructor during the progress of the work and the Subconstructor will be held responsible for advising the Constructor of his requirements sufficient in advance of the time such items will be required to enable procurement without delaying progress. [47]

“(c) Nearly all of the materials required for the work has been stored in Power House No. 1 or in warehouses adjacent thereto. Materials, equipment and machinery which have been stored and which have been subjected to conditions necessitating reconditioning, refinishing, refacing, cleaning, painting, packing (in valves and pumps), and similar work to properly prepare for installation and operation will be reconditioned, refinished, etc., by the Subcontractor as a part of this subcontract, except however, that such reconditioning, refinishing, etc., shall apply only to defects which have resulted from storage and does not include inherent defects in manufacture or material. Materials, equipment and machinery which have been broken or otherwise damaged beyond use or repair during storage, or which have inherent defects in manufacture or material caused through no fault or negligence or the subconstructor will be replaced by the Constructor without cost to the Subconstructor.

“Disputes” provisions.

(a) Of the Contract:

Article VI

“All disputes concerning questions of fact arising under this subcontract shall be decided by the Contracting Officer, whose decision shall be in writing, subject to appeal by either party hereto within 30 days from the receipt of the Contracting Officer’s decision to the Chief of Engineers whose decision shall be final and conclusive upon the parties hereto. Notwithstanding this provision, the subcontractor shall diligently proceed with the work as directed.”

(b) Of the Specifications.

“1-11. Claims, Protests and Appeals. If the Subconstructor considers any work demanded of him to be outside the requirements of the subcontract, or if he considers any action or ruling of the Constructor or of the inspectors to be unfair, the Subconstructor shall without undue delay, upon such demand, action or ruling, submit his protest thereto in writing to the contracting officer stating clearly and in detail the basis of his objections. The Contracting Officer shall thereupon promptly investigate the complaint and furnish the Subconstructor his decision thereon in writing. If the Subconstructor is not satisfied with the decision of the Contracting Officer, he may, within thirty (30) days, appeal in writing to the Chief of Engineers, whose decision, or that of his duly authorized representative, shall be final and binding upon the parties to the subcontract. Except for such protests or objections as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions or decisions of the Contracting

Officer shall be final and conclusive. All appeals from the decisions of the Contracting Officer authorized under the subcontract shall be addressed to the War Department, Chief of Engineers, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the Subconstructor bases his claim for relief and should be presented to the Contracting Officer for transmittal within the time provided therefor in the subcontract.

“Provided, however, in case of dispute or disagreement within the meaning of this paragraph, the Subconstructor [49] shall first submit his protest in writing to the Constructor, stating clearly and in detail the basis of his protest. The Constructor will thereupon investigate the complaint and furnish the Subconstructor its written decision thereon. If the Subconstructor is not satisfied with the decision of the Constructor he may then proceed as outlined herein.”

“Delay” provisions.

(a) General Provisions of the Contract.

Article III

“If the subconstructor refuses or fails to prosecute the work * * * the Constructor may * * * terminate its right to proceed with the work. * * * Provided, that the right of the Subconstructor to proceed shall not be terminated under this Article, because of any delays in the completion of the work due to causes beyond the control and without the fault or negligence of the subconstructor including, but not restricted to, acts of the Constructor. * * *

(b) General Provisions of the Specifications.

“1-05. Commencement, Prosecution and Completion. (a) The Subconstructor will be required to commence work under the subcontract within five (5) calendar days after the date of the receipt by him of Notice to proceed and will be required to prosecute said work faithfully and energetically and to complete the work within one hundred twenty (120) calendar days, the time to be computed from said date of receipt of Notice to Proceed, except as provided hereafter in this paragraph.

“(b) In the event the total payments for work actually constructed by the Subconstructor under the subcontract exceed the original amount of the subcontract, the time [50] for completion of the subcontract will be extended in proportion that payments for work in excess of the original amount of the subcontract bear to the total original consideration of the subcontract. In case the total work actually constructed is less than the specified amount, the time for completion of the subcontract will remain the same as specified herein.

“(c) When conditions at the site of the proposed work are considered by the Constructor to be unfavorable to its prosecution, the Constructor may order the subconstructor in writing to suspend work under the subcontract until the Constructor considers that the unfavorable conditions for the prosecution of the work no longer exists. When the work is so suspended, the time allowed for completion will be increased by an amount equal to the

time of suspension as determined by the Constructor.

“(d) If the Subconstructor fails to perform the work at a rate satisfactory to the Constructor, as specified in subsection (a) above by reason of delays in the delivery of materials or supplies essential to such performance, because of war priorities, or, because of conditions existing through no fault or negligence of the Subconstructor, he may be excused for such failure upon the presentation to and the approval by the Constructor of a written statement setting forth distinctly the causes of such failure.

“(e) In case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the Subconstructor will accept the additional time in which to complete his subcontract in full satisfaction of any [51] delays encountered, and the Constructor will not be liable for any costs or expenses incurred by the Subconstructor as a result of the increased time for completion of the Subcontract.

“(f) Inasmuch as the provisions of the subcontract documents relating to the time for and the rate of performance of the work and the time for completion of the same are inserted for the purpose of enabling the United States Government to proceed with the construction of the Sunflower Ordnance Works in accordance with its predetermined program of War Effort, such provisions are of the essence of the subcontract.

“(g) No liquidated damages are provided for

under the specifications nor will such damages be provided for in the subcontract.”

(c) Special provisions of the Contract.

“This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove, and collect damages by reason of the late delivery of materials notwithstanding the provisions of Par. 1-05 of the specifications.”

Prior to this contract a general contract was entered into on March 25, 1942, and was designated as “Contract No. W461 eng 10274” between the United States of America and Wm. L. Lozier, Inc., Broderick and Gordon; it was what is known as a “cost plus a fixed fee” contract. It covered the erection of the Sunflower Ordnance works near Kansas City.

On September 1, 1942, a subcontract, known as “F F Construction Subcontract No.”, was entered into between Architect-Engineer-Manager, hereinafter designated as A E M, [52] and W. E. Joslin an individual of the City of San Francisco, California, doing business as Cory-Joslin and Macnsons, for the installation of Plumbing, Heating and Ventilating facilities at the Sunflower Ordnance Works. This contract was also a “cost plus a fixed fee” contract. Later the subcontract in question here was entered into between the plaintiff and the defendant.

Leading up to this Subcontract, invitation to bid was prepared by C. Howard Murphy, Manager of

the Subcontract Department of the A E M. It consisted of a letter, with a copy of the specifications attached.

Bids were opened July 8. Plaintiff's bid was prepared and was submitted on July 8. Plaintiff, the low bidder, at \$448,000. Lump sum was awarded the contract on July 13, this bid covered only the cost of erection. All installation materials and equipment of an approximate value of \$1,145,000 were to be furnished by the defendant, or by those with whom he was contracting, directly or indirectly. Notice to proceed was immediately mailed to and received by plaintiff on July 13.

As soon as the award was made to plaintiff the subcontract department of the A E M through G. Howard Murphy, its Manager, prepared a formal subcontract and mailed it to plaintiff for its signature on July 14. Plaintiff refused to sign the subcontract as prepared because it provided for completion in 120 days without including any provision to compensate the plaintiff for damages if delay in performance should result from the shortages of materials. Several weeks went by during which the parties were negotiating in person and by letter with respect to an increase in cost if performance should be delayed, and with respect to a clause in the contract to protect plaintiff against damages in case of delay. [53]

On August 3, Plaintiff wrote defendant that a predicted delay of six weeks would require an in-

crease in the contract price to cover the following items:

Increase in actual costs	\$34,343.00
S S O A Bldrs Risk Bond.....	1,888.00
Margin 15%	5,151.00

Total price adjustment on account

of delay\$41,382.00

On August 4, this proposal was given to the A E M. On the same date A E M advised defendant that no recommendation could be made for additional compensation at that time.

On August 8, Plaintiff submitted to defendant a letter requesting that there be appended to the signature sheet of the formal contract the following proviso:

“Water wall and roof boiler tubes, which were to have been furnished by the Constructor and available to the subconstructor immediately he was directed to proceed were not and are not as of date of contract so available. This contract is above executed by the subconstructor reserving full rights of recourse to claims for extension of time, and for reimbursement of such increased cost as may be occasioned by non-availability of these above mentioned materials, which were represented in bidding information to be at the site as of date of direction to proceed.”

On August 17, defendant wrote plaintiff that the paragraph suggested in Plaintiff's letter of August 8 was not acceptable.

On August 22, Plaintiff requested the defendant

to state in a letter to plaintiff whether a claim for reimbursement of its increased costs would be valid or invalid under the terms [54] of the contract submitted to plaintiff for signature if there should be proven to be;

1. An increase in the subcontractor's cost because of delay in delivery of materials, if he prosecutes the work without due regard to economy in order to complete as early as possible; or

2. An increase of the period of construction beyond 120 days, for the reason of delayed delivery of materials.

On August 31, defendant declined to write such a letter, but indicated that a contract might be approved with a proper reservation on the signature page. Thereafter, on September 11, 1944, there was added to the signature page of the formal contract, before the contract was executed, a clause which was initialed by all of the parties to the contract as follows:

“This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials notwithstanding the provisions of paragraph 1-05.”

Performance commenced with the preparation of the inventory required under paragraph 5-04(b). This inventory took more than eight weeks to complete.

No verbal representation was made by anyone to

plaintiff in respect to the tubes and headers, as to whether they were or were not in storage. The only representation in this respect is contained in paragraph 5-04(c) of the specifications wherein it is provided:

“Nearly all of the materials required for the work has been stored in Power House No. 1, or in warehouses adjacent thereto.” [55]

By July 26, Plaintiff had progressed to the point in the preparation of the field inventory where it appeared certain that there was a major shortage of materials,—tubes and headers,— that would delay the progress of the work beyond the contract schedule of 120 days. Accordingly on that date plaintiff notified the defendant in writing of the shortages. Defendant immediately referred this letter to the A-E-M which replied in a letter signed by J. S. Hagan Chief Engineer, on July 29, that the shortage would not delay the work.

On August 17, and again on August 19, plaintiff confirmed shortages of tubes and headers. At the same time these shortages were specifically called to the attention of Elmer Bennett, representative of the Combustion Engineering Company who had been sent to the job by his employer to expedite performance.

On August 19, defendant through its representative Ralph Jung suggested that plaintiff go on record with a letter stating certain facts encountered in installing water wall tubes. Such a letter was written on August 29. On August 22, plaintiff

wrote defendant that certain water wall headers had been improperly manufactured and would be unfit for use under the contract.

Neither plaintiff nor defendant had any control over procuring any of the materials that the defendant was required to furnish. The tubes themselves were furnished by the Combustion Engineering Company, although manufactured by a steel or tube mill such, for example, as the Republic Steel Corporation, or the Globe Tube Company, or any one of a dozen similar mills. However, these tubes had been shipped to the Combustion Engineering factory where they were cut to length [56] bent to a definite shape and parts were welded on so as to make a complete unit of a tube to fit in a definite location in the boiler until that was designed especially for the Sunflower Ordnance Project. In fact, the particular water wall tubes which were used at Sunflower were designed, manufactured and furnished by the Combustion Engineering Company under patents which were solely owned by that Company. There was no place else in the United States where these tubes could be obtained other than from the Combustion Engineering Company. It was not possible, therefore, for any of the contracting parties, or others, to go on the open market and purchase the tubes needed. They were manufactured for this particular unit or for units like it only by the Combustion Engineering Company.

The next step was to prepare a schedule of

progress, or construction schedule, for approval by the Contracting Officer of the Government. Plaintiff's original schedule was furnished prior to July 24, but criticisms resulted in a revision on August 17, and it was approved on August 22. This schedule was brought up to date each week. From this Schedule the contracting parties were able to determine the exact date on which essential materials such as tubes and headers were required for the orderly prosecution of the contract. It was approved as reasonable by all of the parties concerned, including the Government and the defendant.

There were three units, identical in Character, upon which identical operations were to be performed. The normal procedure followed by the plaintiff in the erection of such units was to do the work on unit one, then move to number two and repeat and then to unit number three. The construction crew could work more efficiently on the second and third units due to increased familiarity with the exact operations required. [57] The steps in which a contractor must proceed to attain maximum efficiency in the construction of these units are:

Line and place boiler drums in final position.

Install the tubes for the boiler proper and the water tubes.

Install the air heater tubes in a position back of the boiler, in a separate unit, so to speak.

Place a hydrostatic test on the boiler and water tubes.

Install the boiler brick work, insulation and casing.

Erect the pulverized coal burner and duct work.

Install drum internals and boiler appurtenances such as safety valves, steam gauges and water columns; install the instruments and combustion control, the sensitive part of the work, such as small tubes, fittings and miscellaneous apparatus that control the function of the unit; install the recording instruments that record the steam pressure, steam temperature and the flue gas as it leaves the boiler; install the apparatus that controls the supply of coal to the unit, and the supply of air for combustion in proportion to the load or demand on the unit.

The final phase is what plaintiff calls the 'drying out' fire. A slow wood fire is put in the boiler and left for a week to dry out the insulation, the mortar that is in the brick work and in the jacket. At that time the oil and grease that has accumulated in the erection of the work is cleaned out so the boiler is entirely clean before it goes into service. This is followed by a period of adjustment, trial, inspection and operation. This was the sequence in operation.

In estimating for the bid on this job, plaintiff contemplated that the various operations would be done in sequence. This method is recognized by all contractors and by [58] manufacturer's representa-

tives as being normal and orderly. The design of the unit as a whole by the builder is predicated on the assumption that it will be erected in a normal sequence of procedure. Such a method results in labor and time saving.

The only materials that it is claimed delayed the construction program were namely: The water wall tubes and water wall headers.

Plaintiff's proposal and construction schedule, to meet the contract conditions required that these items were to be on the job and available for installation when needed. The installation of the water wall tubes should be done early in the erection program and their installation must be completed before the erector can proceed with the hydrostatic tests, the erection of the boiler brickwork and casing, boiler piping, combustion control and boiler trim.

After being awarded the contract, and while taking inventory of the boiler materials, it was discovered that these shortages existed. No one employed by the defendant was aware of this shortage until after the contract had been awarded, although it was definitely known in the Engineering Department of the A-E-M. In the time allowed for preparation of bid, it would have been impossible for any bidder to have determined by observation prior to the letting, whether or not there was a shortage of this material, because to have done so would have required the moving and handling of several hundred tons of materials and would have

required much more time than was available. The only delay was occasioned by shortages of the water wall tubes and headers.

An inspection was made almost daily by representatives of the A-E-M and the Government. No complaint was made by these inspectors verbally or in writing to any representative of the plaintiff.

Claim for damages. The contract called for completion on November 10, 1944. It was actually completed on December 19, 1944. On February 21, 1945, plaintiff submitted a claim for damages in the amount of \$9,323.02. On June 30, 1945 an amended claim for \$10,008.70 was presented. In each instance the claim enumerated only two items of damages, to-wit:

1. The increased cost of renting equipment.
2. The increased cost of supervisory personnel.

In each instance the claims did not include the following additional elements or items of damage.

1. Cost of 90 days extra time by Borst.
2. Home office overhead for 39 days.
3. Increased cost of labor through delay that is now included in the complaint.

On March 3, 1945 the defendant acknowledged receipt of the claim for \$10,008.70 and made no denial of plaintiff's right to damages in that amount and requested additional date. On July 11, 1945, the defendant denied the claim, not on the ground that plaintiff was not entitled to damages, but on the ground that he was unable to

determine the amount to which plaintiff was entitled. Specifically the defendant's letter reads:

“Please be advised that Cory-Joslin & Macnsons has made a careful study of the facts stated in all of the foregoing letters, as a result of which Cory-Joslin & Macnsons is unable to determine, (1) the actual number of days of delay, if any, chargeable to the alleged delayed delivery of water-wall tubes and proper water-wall headers, (2) the true and correct amount of your claim, and (3) the part of your claim if any, properly chargeable to the alleged delay of delivery of said materials. [60]

“Accordingly, Cory-Joslin & Macnsons is herewith denying your claims and both of them in their entirety.”

Plaintiff held the opinion that under the “disputes” provisions of the contract that it would be necessary to submit its claim to and obtain the opinion of the Chief of Engineers at Washington. Accordingly the Government contracting Officer made a detailed examination of the facts. These findings, with plaintiff's claim dated September 29, 1945 were forwarded to the office of the Chief of Engineers, Washington. On March 12, 1946, the Chief of Engineers ruled that he had no authority to pass upon the plaintiff's claim because it was a claim for unliquidated damages resulting from an alleged breach of contract which is recoverable in a judicial proceeding and not through administrative procedure. On June 19, 1946 the present action was instituted.

The questions presented to the Court for decision are:

1. Does the contract between plaintiff and defendant as written provide that defendant shall pay damages caused by the late delivery of material by the defendant.

2. If the contract as written does so provide was the contract breached by the defendant.

3. If the answer is yes to No. 1 and No. 2, was plaintiff damaged and if so, how much.

4. If the Court's construction of the contract as written is against the plaintiff then should the contract be reformed so as to express the intentions of the parties as prayed for in Count II.

5. Was there any consideration for the Special damage clause added to the signature page.

It is not necessary for the Court to comment as to the 4th question as it appears to the Court that the contract as written is a plain and understandable contract, there is [61] a conflict in the contract between the provisions of Par. 1-05 (e) of the specifications and the clause added to the contract prior to signature by the parties.

Paragraph 1-05 (e) of the specifications provides as follows:

“(e) In case time for completion of the work is increased due to any of the causes specified herein it is distinctly understood and agreed that the subcontractor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered, and the Constructor

will not be liable for any costs or expenses incurred by the subcontractor as a result of the increased time for completion of the subcontract.”

However, none of the parties signed the contract and the plaintiff refused to sign until the following clause was added to it:

“This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove, and collect damages by reason of the late delivery of materials notwithstanding the provisions of paragraph 1-05 of the specifications.”

This clause was added to the contract at the insistence of the plaintiff: it was approved by every one connected with the contract, certainly there could be no binding contract until it was signed and approved. If the bid and acceptance was the complete contract there would have been no necessity for the bond, the written contract and the formalities leading up to its execution. It must be remembered that the bid itself provided that it would not be binding until the contract and bond was executed and approved. [62]

It is not necessary to follow the steps leading up to the signing of the contract as it is plain that the plaintiff insisted from the start that something must be done about the shortage of material either an increase in the contract price or the clause allowing damage for delay.

I will further say that the clause added to the

contract is controlling, it must be said that the provision contained in this clause is in conflict with par. 1-05 (e) of the specifications and although the contract must be construed in its entirety and the clauses construed together, it is plain here that the added clause was intended to supersede the other and should control, for where there is a plain repugnancy between the provisions of a contract as to a provision originally contained in the contract and an added clause, relating to the same provision and inserted in the contract as this clause was, the earlier clause must yield to the latter as far as the conflict exists, particularly is this true when the added clause expresses, as here, the intention of the parties to the contract. It seems to the Court that there is no difficulty here in construing this contract.

It is well settled that where there are inconsistent provisions in a contract one provision being written in, the other being part of the printed form, the written provision (certainly in the absence of any proof to the contrary) will be assumed to express the intent of the parties.

Although this clause was not written but typed as an addition to the contract with the background that lead up to its being typed and added to the contract there is no distinction in the rule as above set forth.

I am of the opinion that this clause added to the contract before execution evidenced the intention of the parties that the plaintiff here was to be paid

any damage it might sustain from failure on the part of the defendant to furnish materials. [63]

Count II will not be considered by the Court and all testimony offered as to County II will not be considered and the objections to its admissibility will be sustained and where motions to strike were made and taken under advisement by the Court, the motions will be granted.

The next question, was there any consideration for the damage clause on the signature page of the contract?

There is no question in the Court's mind that there was sufficient consideration for the added clause. Sec. 1-29 of the specifications upon which the original bid was based specifically provides that there would be no binding contract until it was executed by all the parties and approved by the A-E-M, and the contracting officers. This clause providing for damages was added before any of the parties signed the contract; it was a part of the contract; there is ample consideration for the damage clause.

The next question is; can damages be recovered in excess of the claim originally filed by the plaintiff? Counsel for plaintiff contends it can, basing a part of his contention on the pleadings in this case. The Court feels that its decision should be based on the facts brought out at the trial and will deal with the facts in passing on this question.

The evidence shows that on July 24, 1945, plain-

tiff submitted its claim in the amount of \$10,-008.70.

On March 18, 1946 plaintiff was paid \$1,000.00 and receipted in full under its contract. Plaintiff accepted the \$1,000.00 and receipted in the following language: [64]

“March 18, 1946. Power Service Corporation, 711 Wesley Temple Bldg., Minneapolis, Minn.

“Final payment on subcontract F.F. No. 5 to Government Contract No. W-461-Eng-10274 \$1,-000.00.

“Payment in full exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision.

POWER SERVICE CORP.

(Seal)

P. C. GAFFNEY,
Treasurer.”

It was known to all the parties what that claim was. Plaintiff reserved its right to the claim as submitted and defendant made payment in full, except this claim, to the subcontractor. All parties had knowledge of conditions as they then existed, defendant, it seems, clearly intended to make final payment in full exclusive of the outstanding claim of plaintiff. Plaintiff states that it so received it, there can be no misunderstanding here.

The Court is of the opinion that it was clearly understood that settlement was made in full and there is no basis for any action against defendant

for damages except as was included in the claim reserved.

This case was therefore narrowed down to where it is only a question of determining the amount of damage sustained by the plaintiff through failure to furnish material (limited to the water wall tubes and headers) under the original contract as drawn and as prayed for in Count I. It is also limited to the claim, exhibit 35 filed by the plaintiff.

This makes it unnecessary for the Court to pass on the [65] objections and motions to strike made as to evidence introduced in support of Count II and the evidence introduced as to damage claimed in excess of the claim as filed. It also makes it unnecessary for the Court to pass on the motion for judgment on the pleadings as the foregoing disposes of the question raised and overrules in part and sustains in part the questions raised by the defendant. There were several other minor rulings of the Court to the effect that matters were taken under advisement. These objections and motions are not urged in the briefs filed by either side and are of so little importance that it is not necessary that the Court consider them at this time. As to the final question which is the amount of damages that should be awarded to the plaintiff. This is a more difficult question to determine.

While W. Lyle Borst testified that if the water wall tubes had been delivered on time the contract could have been completed in 120 days, and that the plaintiff was delayed by the failure to deliver

for a period of forty days. As to the claim that the Court is considering here the amount of such loss is listed in exhibit 35 and it is not necessary to list it here. This testimony of Mr. Borst's was based mainly on the production chart exhibit 62 and I think it can be said that in determining the delay this chart is more or less controlling, in fact it must be considered in connection with a great portion of the testimony given in this case.

The failure to deliver the water wall tubes and headers being the only cause of delay for which damages are claimed, it is necessary to determine the extent of the damage occasioned thereby.

First, as to Boiler No. 1. Plaintiff contends that the water wall tubes were required on August 1, 1944 but that they were not received until August 17, 1944, 16 days late, and the evidence supports the fact that the defendant was advised [66] that they would be needed on August 1, the evidence disclosed that the first delay (exhibit 17) was August 16, causing delay of one or two days according to the time of day they were delivered. The production chart shows that this part of the work was 84.5 per cent complete on August 25, and on this percentage it would have taken to August 31 to complete. It was completed on September 8, eight days later than it should have been if the production chart schedule had been maintained. Only two days should be charged to the defendant.

Second, as to Boiler No. 2. Plaintiff contends

that the water wall tubes were required August 8, 1944, but that they were not received until September 20, 1944, 43 days late. On what day delivery was actually made is not clear, however, the production chart shows that plaintiff proposed 42 days for completion, from July 20, to September 3, or 2.38 per cent per day. If they had maintained their schedule they would have completed this segment on October 20. It was practically complete on October 27, seven days late.

Third, as to Boiler No. 3. Plaintiff contends:

Water wall tubes required August 15, 1944

Water wall tubes received September 21, 1944

Water wall tubes 36 days late.

Water wall headers required at start of job, August 15, 1944 latest.

Water wall headers received September 26, 1944

Water wall headers 41 days late.

Boiler tubes on Boiler No. 3 were found to be defective and several days delay was experienced awaiting for new replacement tubes. [67]

If the construction schedule had been maintained it would have been completed on October 14. It was completed October 20, six days late.

The production chart in all, for the water wall tubes and headers for the three boilers, shows twenty-one days delay, and taking the testimony of Mr. Borst for the Plaintiff, and Mr. Joslin for the defendant, both very able engineers and well qualified in this line of work, with the reliance each placed on the production chart, it can be said

that 21 days delay resulted in the completion of this work. However, the testimony of the Plaintiff is that there was no actual delay on Boiler No. 1 until August 15 because of the delayed delivery of water wall tubes and headers, so we cannot consider the chart in fixing the delay on Boiler No. 1. On Boilers No. 2 and No. 3 we take the completion date as shown by the chart in fixing the number of days plaintiff was delayed because of failure to deliver water wall tubes and headers. Instead of 21 days as shown by the construction chart, we have:

2 days on Boiler No. 1 (Testimony of Plaintiff)

7 days on Boiler No. 2

6 days on Boiler No. 3

a total of 15 days delay.

It must also be borne in mind that during the period of time covered by the contract the plaintiff performed three modifications, under their contract, Modification No. 1 for which the plaintiff was paid \$8,382.17; Modification No. 2 for which plaintiff was paid \$4,705.98 and Modification No. 2 for which plaintiff was paid the sum of \$5,732.92.

Also between the time when the material was actually required and the time it was furnished, other phases of the [68] construction work proceeded, with the same labor that would have been used on the boilers, during the period of delay. For example, take the date of September 23, the segment "Low Pressure exhaust and steam" item

was proposed to be 69 per cent complete, and on that date, September 23, was 89 per cent complete. Item Number 4 of the construction schedule, "Treated, softened water, cooling water" was to be 55 per cent complete and that was 63.8 per cent complete. It is not necessary to take up all of these items that were ahead of schedule but it demonstrates that other segments of the work were proceeding ahead of schedule, while this delay existed on the furnishing of water wall tubes and headers.

I have also eliminated the percentage that the plaintiff was behind in the construction prior to the delay in furnishing the water wall tubes and headers, something over four per cent.

The claim as presented by the plaintiff, exhibit No. 35, when broken down into the loss per day, applying the full number of 40 days, is arrived at by division, and the daily loss amounts to \$250.21. The fifteen day delay, at the above rate amounts to \$3,753.15. Plaintiff is entitled to Judgment for this amount together with costs which will include the cost of the preparation of transcript, as stipulated by counsel at the trial.

The Court is of the opinion that interest should be allowed on the amount of \$3,753.15 from March 18, 1946, the date of the final settlement on the contract. However if Counsel have something to present on this question of interest, the Court will hear them by letter in that regard and will make

final determination at the time of signing findings of fact, conclusions of law and judgment. [69]

Counsel for plaintiff will prepare findings, conclusions and judgment in accordance with this opinion. [70]

[Endorsed]: Filed April 1, 1848.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause involved a claim for damages in the amount of \$34,343.00 for delay in the performance of a construction contract. Plaintiff alleges damages for delay in construction by failure of the defendant to deliver material at the site of the project.

Plaintiff's petition is in three counts. Count I seeks a declaration of the rights under the contract as written and in the alternative, if the construction of the contract be adverse to plaintiff, Count II seeks reformation of the contract to make it express the intention of the parties, and Count III seeks recovery.

The cause came on for trial and the Court, having heard the evidence and read the briefs of the respective counsel, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. The Court has jurisdiction of this action

under 28 USCA, Secs. 12, 41(1) and 400. The plaintiff and the defendant are citizens of different states and more than \$3,000 is in controversy in this action.

2. The particular provisions of the contract to be construed which affect the present controversy are as follows: [71]

Article I.

“(a) The work shall be commenced within five (5) calendar days after the date of receipt of notice to proceed, and shall be completed in accordance with paragraph 1-05 of the ‘General Provisions and Specifications.’

“(b) The subcontractor shall be required to do the following work:

“The work shall include the furnishing of all plant, equipment, labor and materials (excepting materials to be furnished and/or work to be performed by the Constructor and/or others as specifically provided for in the General Provisions and Specifications) and perform all work necessary for the complete erection of Boilers in Power House Number 1, at the Sunflower Ordnance Works, Johnson County, Kansas, in strict accordance with plans and specifications and as directed in writing by the Constructor for and in consideration of the Lump Sum price of Four Hundred Forty Eight Thousand Dollars and no Cents (\$448,000.00); in strict accordance with the specifications, schedules and drawings, all of which are made a part hereof **and designated as follows: Specifications entitled**

‘General Provisions and Specifications for complete erection of boilers in Power House No. 1 at Sunflower Ordnance Works, Johnson County, Kansas’,
* * *”

Materials to be furnished—(specifications)

“5-04 (a) Materials furnished by the Constructor. In general, all materials, equipment and machinery which will actually be incorporated into the permanent construction will be furnished by the Constructor and/or others. Materials and supplies incidental to the permanent construction, including but not limited to cutting oil, wire, fuel for construction equipment, welding bars, cement grout and concrete, scaffolding, forming temporary bracing and blocking, pipe dope and compound, all erection facilities and equipment, etc. will be supplied by the Subconstructor without cost to the Constructor over and above the subcontract price. Fuel for use in testing operating equipment and for putting the plant in operation will be supplied by the Constructor. Materials furnished by the Constructor will be delivered to the Subconstructor at points and in the manner specified. Section VII hereof.

“(b) Immediately after starting work under the subcontract the subconstructor shall prepare a ‘list of materials’ including accessories and equipment required, and shall check this list against the materials, accessories and [72] equipment stored in or adjacent to the Power House in order that shortages may be immediately determined. Such shortages will then be reported to the Constructor for

use in obtaining the balance of materials required for the completed work. Such an inventory will be kept current by the Subconstructor during the progress of the work and the Subconstructor will be held responsible for advising the Constructor of his requirements sufficient in advance of the time such items will be required to enable procurement without delaying progress.

“(c) Nearly all of the materials required for the work has been stored in Power House No. 1 or in warehouses adjacent thereto. Materials, equipment and machinery which have been stored and which have been subjected to conditions necessitating reconditioning, refinishing, refacing, cleaning, painting packing (in valves and pumps), and similar work to properly prepare for installation and operation will be reconditioned, refinished etc., by the Subcontractor as a part of this subcontract, except however, that such reconditioning, refinishing etc., shall apply only to defects which have resulted from storage and does not include inherent defects in manufacture or material. Materials, equipment and machinery which have been broken or otherwise damaged beyond use or repair during storage, or which have inherent defects in manufacture or material caused through no fault or negligence of the subcontractor will be replaced by the Constructor without cost to the Subconstructor.”

“Disputes” provisions.

(a) Of the Contract:

Article VI.

“All disputes concerning questions of fact arising under this subcontract shall be decided by the Contracting Officer, whose decision shall be in writing, subject to appeal by either party hereto within 30 days from the receipt of the Contracting Officer’s decision to the Chief of Engineers whose decision shall be final and conclusive upon the parties hereto. Notwithstanding this provision, the subcontractor shall diligently proceed with the work as directed.”

(b) Of the Specifications.

“1-11. Claims, Protests and Appeals. If the Subconstructor considers any work demanded of him to be outside the requirements of the subcontract, or if he considers any action or ruling of the Constructor or of the inspectors [73] to be unfair, the Subconstructor shall without undue delay, upon such demand, action or ruling, submit his protest thereto in writing to the Contracting Officer stating clearly and in detail the basis of his objections. The Contracting Officer shall thereupon promptly investigate the complaint and furnish the Subconstructor his decision thereon in writing. If the Subconstructor is not satisfied with the decision of the Contracting Officer, he may, within thirty (30) days, appeal in writing to the Chief of Engineers, whose decision, or that of his duly authorized representative, shall be final and binding upon the parties to the subcontract. Except for such protests or objections as are made of record in the manner

herein specified and within the time limit stated, the records, rulings, instructions or decisions of the Contracting Officer shall be final and conclusive. All appeals from the decisions of the Contracting Officer authorized under the subcontract shall be addressed to the War Department, Chief of Engineers, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the Subconstructor bases his claim for relief and should be presented to the Contracting Officer for transmittal within the time provided therefor in the subcontract.

“Provided, however, in case of dispute or disagreement within the meaning of this paragraph, the Subconstructor shall first submit his protest in writing to the Constructor, stating clearly and in detail the basis of his protest. The Constructor will thereupon investigate the complaint and furnish the Subconstructor its written decision thereon. If the Subconstructor is not satisfied with the decision of the Constructor he may then proceed as outlined herein.”

“Delay” provisions.

(a) General Provisions of the Contract.

Article III.

“If the subconstructor refuses or fails to prosecute the work * * * the Constructor may * * * terminate its right to proceed with the work * * * Provided, that the right of the Subconstructor to proceed shall not be terminated under this Article, because of any delays in the completion of the

work due to causes beyond the control and without the fault or negligence of the subconstructor including, but not restricted to, acts of the Constructor.

* * *

(b) General Provisions of the Specifications.

“1-05. Commencement, Prosecution and Completion. (a) The Subconstructor will be required to commence work under the subcontract within five (5) calendar days after the date of the receipt by him of Notice to proceed and will be required to prosecute said work faithfully and energetically and to complete the work within one hundred twenty (120) calendar days, the time to be computed from said date of receipt of Notice to Proceed, except as provided hereafter in this paragraph.

“(b) In the event the total payments for work actually constructed by the Subconstructor under the subcontract exceed the original amount of the subcontract, the time for completion of the subcontract will be extended in proportion that payments for work in excess of the original amount of the subcontract bear to the total original consideration of the subcontract. In case the total work actually constructed is less than the specified amount, the time for completion of the subcontract will remain the same as specified herein.

“(c) When conditions at the site of the proposed work are considered by the Constructor to be unfavorable to its prosecution, the Constructor may order the subconstructor in writing to suspend work

under the subcontract until the Constructor considers that the unfavorable conditions for the prosecution of the work no longer exists. When the work is so suspended, the time allowed for the completion will be increased by an amount equal to the time of suspension as determined by the Constructor.

“(d) If the Subconstructor fails to perform the work at a rate satisfactory to the Constructor, as specified in subsection (a) above by reason of delays in the delivery of materials or supplies essential to such performance, because of war priorities, or, because of conditions existing through no fault or negligence of the Subconstructor, he may be excused for such failure upon the presentation to and the approval by the Constructor of a written statement setting forth distinctly the causes of such failure.

“(e) In case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the Subconstructor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered, and the Constructor will not be liable for any costs or expenses incurred by the Subconstructor as a result of the increased time for completion of the Subcontract. [75]

“(f) Inasmuch as the provisions of the subcontract documents relating to the time for and the rate of performance of the work and the time for completion of the same are inserted for the purpose of enabling the United States Government to pro-

ceed with the construction of the Sunflower Ordnance Works in accordance with its predetermined program of War Effort, such provisions are of the essence of the subcontract.

“(g) No liquidated damages are provided for under the specifications nor will such damages be provided for in the subcontract.”

(c) Special provisions of the Contract.

“This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove, and collect damages by reason of the late delivery of materials notwithstanding the provisions of Par. 1-05 of the specifications.”

3. Prior to this contract a general contract was entered into on March 25, 1942, and was designated as “Contract No. W461-eng-10274,” between the United States of America and Wm. L. Lozier, Inc., Broderick and Gordon; it was what is known as a “cost-plus-a-fixed-fee” contract. It covered the erection of the Sunflower Ordnance Works near Kansas City.

4. On September 1, 1942, a subcontract, known as “F F Construction Subcontract No. 5,” was entered into between Architect-Engineer-Manager, hereinafter designated as A-E-M, and W. E. Joslin, an individual of the City of San Francisco, California, doing business as Cory-Joslin and Macnsons, for the installation of the plumbing, heating and ventilating facilities at the Sunflower Ordnance

Works. This contract was also a "cost-plus-a-fixed-fee" contract. Later the subcontract in question here was entered into between the plaintiff and the defendant.

5. Leading up to this Subcontract, an invitation to bid was prepared by C. Howard Murphy, Manager of the Subcontract Department [76] of the A-E-M. It consisted of a letter, with a copy of the specifications attached.

6. Bids were opened July 8. Plaintiff's bid was prepared and was submitted on July 8. Plaintiff, the low bidder, at a \$448,000 lump sum bid, was awarded the contract on July 13. This bid covered only the cost of erection. All installation materials and equipment, of an approximate value of \$1,145,000, were to be furnished by the defendant, or by those with whom he was contracting, directly or indirectly. Notice to proceed was immediately mailed to and received by plaintiff on July 13.

7. As soon as the award was made to plaintiff the subcontract department of the A-E-M, through C. Howard Murphy, its manager, prepared a formal subcontract and mailed it to plaintiff for its signature on July 14. Plaintiff refused to sign the subcontract as prepared because it provided for completion in 120 days without including any provisions to compensate the plaintiff for damages if delay in performance should result from the shortages of materials. Several weeks went by during which the parties were negotiating in person and by letter with respect to an increase in cost if

performance should be delayed, and with respect to a clause in the contract to protect plaintiff against damages in case of delay.

8. On August 3, plaintiff wrote defendant that a predicted delay of six weeks would require an increase in the contract price to cover the following items:

Increase in actual costs.....	\$34,343.00
SSOA Bldrs. Risk Bond.....	1,888.00
Margin 15%	5,151.00

Total price adjustment on account

of delay \$41,382.00

9. On August 4, this proposal was given to the A-E-M. On the same date A-E-M advised defendant that no recommendation could be made for additional compensation at that time.

10. On August 8, plaintiff submitted to defendant a letter requesting that there be appended to the signature sheet of the formal contract the following proviso:

“Water wall and roof boiler tubes, which were to have been furnished by the Constructor and available to the subconstructor immediately he was directed to proceed were not and are not as of date of contract so available. This contract is above executed by the Subconstructor reserving full rights of recourse to claims for extension of time, and for reimbursement of such increased cost as may be occasioned by non-availability of these above mentioned materials, which were represented in bidding

information to be at the site as of date of direction to proceed.”

11. On August 17, defendant wrote plaintiff that the paragraph suggested in Plaintiff's letter of August 8 was not acceptable.

12. On August 22, plaintiff requested the defendant to state in a letter to plaintiff whether a claim for reimbursement of its increased costs would be valid or invalid under the terms of the contract submitted to plaintiff for signature if there should be proven to be:

(a) An increase in the subcontractor's cost because of delay in delivery of materials, if he prosecutes the work without due regard to economy in order to complete as early as possible; or

(b) An increase of the period of construction beyond 120 days, for the reason of delayed delivery of materials.

13. On August 31, defendant declined to write such a letter, but indicated that a contract might be approved with a proper reservation on the signature page. Thereafter, on September 11, 1944, there was added to the signature page of the formal contract, [78] before the contract was executed, a clause which was initialed by all of the parties to the contract as follows:

“This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of

materials notwithstanding the provisions of paragraph 1-05."

Performance commenced with the preparation of the inventory required under paragraph 5-04(b). This inventory took more than eight weeks to complete.

14. No verbal representation was made by anyone to plaintiff in respect to the tubes and headers, as to whether they were or were not in storage. The only representation in this respect is contained in paragraph 5-04(c) of the specifications wherein it is provided:

"Nearly all of the materials required for the work has been stored in Power House No. 1, or in warehouses adjacent thereto."

15. By July 26, plaintiff had progressed to the point in the preparation of the field inventory where it appeared certain that there was a major shortage of materials,—tubes and headers,—that would delay the progress of the work beyond the contract schedule of 120 days. Accordingly on that date plaintiff notified the defendant in writing of the shortages. Defendant immediately referred this letter to the A-E-M which replied in a letter signed by J. S. Hagan, Chief Engineer, on July 29, that the shortage would not delay the work.

16. On August 17, and again on August 19, plaintiff confirmed shortages of tubes and headers. At the same time these shortages were specifically called to the attention of Elmer Bennett, representative of the Combustion Engineering Company

who had been sent to the job by his employer to expedite performance. [79]

17. On August 19, defendant, through its representative Ralph Jung, suggested that plaintiff go on record with a letter stating certain facts encountered in installing water wall tubes. Such a letter was written on August 29. On August 22, plaintiff wrote defendant that certain water wall headers had been improperly manufactured and would be unfit for use under the contract.

18. Neither plaintiff nor defendant had any control over procuring any of the materials that the defendant was required to furnish. The tubes themselves were furnished by the Combustion Engineering Company, although manufactured by a steel or tube mill such, for example, as the Republic Steel Corporation, or the Globe Tube Company, or any one of a dozen similar mills. However, these tubes had been shipped to the Combustion Engineering factory where they were cut to length, bent to a definite shape and parts were welded on so as to make a complete unit of a tube to fit in a definite location in the boiler unit that was designed especially for the Sunflower Ordnance Project. In fact, the particular water wall tubes which were used at Sunflower were designed, manufactured and furnished by the Combustion Engineering Company under patents which were solely owned by that Company. There was no place else in the United States where these tubes could be obtained other than from the Combustion Engineering Company.

It was not possible, therefore, for any of the contracting parties, or others, to go on the open market and purchase the tubes needed. They were manufactured for this particular unit or for units like it only by the Combustion Engineering Company.

19. The next step was to prepare a Schedule of progress, or construction schedule, for approval by the Contracting Officer of the Government. Plaintiff's original schedule was furnished prior to July 24, but criticisms resulted in a revision on [80] August 17, and it was approved on August 22. This schedule was brought up to date each week. From this schedule the contracting parties were able to determine the exact date on which essential materials such as tubes and headers were required for the orderly prosecution of the contract. It was approved as reasonable by all of the parties concerned, including the Government and the defendant.

20. There were three units, identical in character, upon which identical operations were to be performed. The normal procedure followed by the plaintiff in the erection of such units was to do the work on unit one, then move to number two and repeat and then to unit number three. The construction crew could work more efficiently on the second and third units due to increased familiarity with the exact operations required. The steps in which a contractor must proceed to attain maximum efficiency in the construction of these units are:

(a) Line and place boiler drums in final position.

(b) Install the tubes for the boiler proper and the water tubes.

(c) Install the air heater tubes in a position back of the boiler, in a separate unit, so to speak.

(d) Place a hydrostatic test on the boiler and water tubes.

(e) Install the boiler brick work, insulation and casing.

(f) Erect the pulverized coal burner and duct work.

(g) Install drum internals and boiler appurtenances such as safety valves, steam gauges and water columns; install the instruments and combustion control, the sensitive part of the work, such as small tubes, fittings and miscellaneous apparatus that control the function of the unit; install the recording instruments that record the steam pressure, steam temperature and the flue gas as it leaves the boiler; install the apparatus that controls the supply of coal to the unit, and the supply of air for combustion in proportion to the load or demand on the unit.

(h) The final phase is what plaintiff calls the "drying out" fire. A slow wood fire is put in the boiler and left for a week to dry out the insulation, the mortar that is in the brick work and in the jacket. At that time the oil and grease that has accumulated in the erection of the work is cleaned out so the boiler is entirely clean before it goes into service. This is followed by a period of adjustment, trial, inspection and operation. This was the sequence in operation.

21. In estimating for the bid on this job, plaintiff contemplated that the various operations would be done in sequence. This method is recognized by all contractors and by manufacturer's representatives as being normal and orderly. The design of the unit as a whole by the builder is predicated on the assumption that it will be erected in a normal sequence of procedure. Such a method results in **labor saving and time saving.**

22. The only materials that it is claimed delayed the construction program were namely: The water wall tubes and water wall headers. Plaintiff's proposal and construction schedule, to meet the contract conditions required that these items were to be on the job and available for installation when needed. The installation of the water wall tubes should be done early in the erection program and their installation must be completed before the erector can proceed with the hydrostatic tests, the erection of the boiler brickwork and casing, boiler piping, combustion control and boiler trim.

23. After being awarded the contract, and while taking inventory of the boiler materials, it was discovered that these [82] shortages existed. No one employed by the defendant was aware of this shortage until after the contract had been awarded, although it was definitely known in the Engineering Department of the A-E-M. In the time allowed for the preparation of bid, it would have been impossible for any bidder to have determined by observation prior to the letting, whether or not

there was a shortage of this material, because to have done so would have required the moving and handling of several hundred tons of materials and would have required much more time than was available. The only delay was occasioned by shortages of the water wall tubes and headers.

24. An inspection was made almost daily by representatives of the A-E-M and the Government. No complaint was made by these inspectors verbally or in writing to any representative of the plaintiff.

25. Claim for damages. The contract called for completion on November 10, 1944. It was actually completed on December 19, 1944. On February 21, 1945, plaintiff submitted a claim for damages in the amount of \$9,323.02. On June 30, 1945 an amended claim for \$10,008.70 was presented. In each instance the claim enumerated only two items of damages, to-wit:

(a) The increased cost of renting equipment.

(b) The increased cost of supervisory personnel.

In each instance the claim did not include the following additional elements or items of damage that are now included in the complaint, to-wit:

(a) Cost of 90 days extra time by Borst.

(b) Home office overhead for 39 days.

(c) Increased cost of labor, caused by delay in the delivery of materials. [83]

26. On March 3, 1945, the defendant acknowledged receipt of the claim for \$10,008.70 and made no denial of plaintiff's right to damages in that amount and requested additional data. On July 11,

1945, the defendant denied the claim, not on the ground that plaintiff was not entitled to damages, but on the ground that he was unable to determine the amount to which plaintiff was entitled. Specifically the defendant's letter reads:

“* * * * * Please be advised that Cory-Joslin & Macnsons has made a careful study of the facts stated in all of the foregoing letters, as a result of which Cory-Joslin & Macnsons is unable to determine, first, the actual number of days of delay, if any, chargeable to the alleged delayed delivery of water-wall tubes and proper water-wall headers; second, the true and correct amount of your claim; and third, the part of your claim, if any, properly chargeable to the alleged delay of delivery of said materials.

“Accordingly, Cory-Joslin & Macnsons is herewith denying your claims and both of them in their entirety.”

27. Plaintiff held the opinion, under the “disputes” provision of the contract, that it would be necessary to submit its claim to and obtain the opinion of the Chief of Engineers at Washington. Accordingly, the Government Contracting Officer made a detailed examination of the facts. These findings, with plaintiff's claim dated September 29, 1945, were forwarded to the office of the Chief of Engineers, Washington. On March 12, 1946, the Chief of Engineers ruled that he had no authority to pass upon the plaintiff's claim because it was a claim for unliquidated damages resulting from an

alleged breach of contract which is recoverable in a judicial proceeding and not through administrative procedure.

28. On March 18, 1946 plaintiff was paid \$1,000.00 and receipted in full under its contract. Plaintiff accepted the \$1,000.00 and receipted in the following language: [84]

“March 18, 1946. Power Service Corporation, 711 Wesley Temple Bldg., Minneapolis, Minn.

“Final payment on subcontract F.F. No. 5 to Government Contract No. W-461-Eng-10274 \$1,000.00.

“Payment in full exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision.

POWER SERVICE CORP.,

(Seal)

P. C. GAFFNEY,
Treasurer.

It was known to all the parties what that claim was. Plaintiff reserved its right to the claim as submitted and defendant made payment in full, except this claim, to the subcontractor. All parties had knowledge of conditions as they then existed. Defendant, it seems, clearly intended to make final payment in full exclusive of the outstanding claim of plaintiff. Plaintiff states that it so received it. There can be no misunderstanding here.

29. On June 19, 1946, the present action was instituted. The questions presented to the Court for decision are:

(a) Does the contract between plaintiff and defendant as written provide that defendant shall pay damages caused by the late delivery of material by the defendant.

(b) If the contract as written does so provide was the contract breached by the defendant.

(c) If the answer is yes to (a) and (b), was plaintiff damaged, and if so, how much.

(d) If the Court's construction of the contract as written is against the plaintiff then should the contract be reformed so as to express the intentions of the parties as prayed for in Count II. [85]

(e) Was there any consideration for the Special damage clause added to the signature page.

It is not necessary for the Court to comment on the question in paragraph (d), *supra*, as it appears to the Court that the contract as written is a plain and understanding contract. There is a conflict in the contract between the provisions of Par. 1-05(e) of the specifications and the clause added to the contract prior to signature by the parties.

Paragraph 1-05(e) of the specifications provides as follows:

“(e) In case time for completion of the work is increased due to any of the causes specified herein it is distinctly understood and agreed that the sub-constructor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered, and the Constructor will not be liable for any costs or expenses incurred by

the subconstructor as a result of the increased time for completion of the subcontract."

However, none of the parties signed the contract and the plaintiff refused to sign until there was added to it the following clause:

"This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials notwithstanding the provisions of paragraph 1-05 of the specifications."

This clause was added to the contract at the insistence of the plaintiff; it was approved by every one connected with the contract. Certainly there could be no binding contract until it was signed and approved. If the bid and acceptance was the complete contract there would have been no necessity for the bond, the written contract and the formalities leading up to its execution. The bid itself provided that it would not be binding until the contract and bond was executed and approved.

Count II will not be considered by the Court and all [86] testimony offered as to Count II will not be considered and the objections to its admissibility will be sustained and where motions to strike were made and taken under advisement by the Court, the motions will be granted.

30. This case has, therefore, narrowed down to where it is only a question of determining the amount of damage sustained by the plaintiff through failure to furnish material (limited to the water

wall tubes and headers) under the original contract as drawn and as prayed for in Count I. It is also limited to the claim, Exhibit 35, filed by the plaintiff. The failure to deliver the water wall tubes and headers being the only cause of delay for which damages are claimed, it is necessary to determine the extent of the damage occasioned thereby. This is a more difficult question to determine.

31. W. Lyle Borst testified that if the water wall tubes had been delivered on time the contract could have been completed in 120 days, and that the plaintiff was delayed by the failure to deliver for a period of forty days. As to the claim that the Court is considering here the amount of such loss is listed in Exhibit 35 and it is not necessary to list it here. This testimony of Mr. Borst's was based mainly on the production chart, Exhibit 62, and I think it can be said that in determining the delay this chart is more or less controlling. In fact, it must be considered in connection with a great portion of the testimony given in this case.

32. First, as to Boiler No. 1. Plaintiff contends that the water wall tubes were required on August 1, 1944, but that they were not received until August 17, 1944, 16 days late, and the evidence supports the fact that the defendant was advised that they would be needed on August 1. However, the evidence disclosed [87] that the first delay (Exhibit 17) was August 16, causing a delay of one or two days according to the time of day they were delivered. The production chart shows that this part of the work was 84.5 per cent complete on August

25, and on this percentage it would have taken to August 31 to complete. It was completed on September 8, eight days later than it should have been if the production chart schedule had been maintained. Only two days should be charged to the defendant.

33. Second, as to Boiler No. 2. Plaintiff contends that the water wall tubes were required August 8, 1944, but that they were not received until September 20, 1944, 43 days late. On what day delivery was actually made is not clear, however, the production chart shows that plaintiff proposed 42 days for completion, from July 20 to September 3, or 2.38 per cent per day. If they had maintained their schedule they would have completed this segment on October 20. It was practically complete on October 27, seven days late.

34. Third, as to Boiler No. 3. Plaintiff contends:
Water wall tubes required August 15, 1944.

Water wall tubes received September 21, 1944.

Water wall tubes 36 days late.

Water wall headers required at start of job, August 15, 1944 latest.

Water wall headers received September 26, 1944.

Water wall headers 41 days late.

Boiler tubes on Boiler No. 3 were found to be defective and several days delay was experienced awaiting for new replacement tubes.

If the construction schedule had been maintained it would have been completed on October 14. It was completed October 20, six days late.

35. The production chart in all, for the water

wall tubes and headers for the three boilers, shows twenty-one days delay. [88] Taking the testimony of Mr. Borst for the plaintiff, and Mr. Joslin for the defendant, both very able engineers and well qualified in this line of work, with the reliance each placed on the production chart, it can be said that 21 days delay resulted in the completion of this work. However, the testimony of the plaintiff is that there was no actual delay on Boiler No. 1 until August 15, because of the delayed delivery of water wall tubes and headers, so we cannot consider the chart in fixing the delay on Boiler No. 1. On Boilers No. 2 and No. 3 we take the completion date as shown by the chart in fixing the number of days plaintiff was delayed because of failure to deliver water wall tubes and headers. Instead of 21 days as shown by the construction chart, we have:

2 days on Boiler No. 1. (Testimony of plaintiff)

7 days on Boiler No. 2.

6 days on Boiler No. 3.

a total of 15 days delay.

36. During the period of time covered by the contract the plaintiff performed three modifications, under their contract, Modification No. 1 for which the plaintiff was paid \$8,382.17; Modification No. 2 for which plaintiff was paid \$4,705.98, and Modification No. 3 for which plaintiff was paid the sum of \$5,732.92.

37. Between the time when the material was actually required and the time it was furnished, other phases of the construction work proceeded, with the same labor that would have been used on the boilers,

during the period of delay. For example, take the date of September 23, the segment "Low Pressure exhaust and steam" item was proposed to be 69 per cent complete, and on that date, September 23, it was 89 per cent complete. [89] Item Number 4 of the construction schedule, "Treated, softened water, cooling water" was to be 55 per cent complete and that was 63.8 per cent complete. It is not necessary to take up all of these items that were ahead of schedule but it demonstrates that other segments of the work were proceeding ahead of schedule, while this delay existed in the furnishing of water wall tubes and headers.

38. I have also eliminated the percentage that the plaintiff was behind in the construction prior to the delay in furnishing the water wall tubes and headers, something over four per cent.

39. The claim as presented by the plaintiff, Exhibit 35, when broken down into the loss per day, applying the full number of 40 days, is arrived at by division, and the daily loss amounts to \$250.21. The fifteen-day delay, at the above rate, amounts to \$3,753.15. Plaintiff is entitled to Judgment for this amount together with costs which will include the cost of the preparation of transcript, as stipulated by counsel at the trial.

CONCLUSIONS OF LAW

The Court declares the law to be:

1. There was no binding contract between the parties until it was signed and approved by the

parties with the "special damage clause" on the signature page.

2. While there is a conflict in the contract between the provisions of paragraph 1.05(e) in the printed form of the Specifications and the "special damage clause" typed on the signature page prior to signature by the parties, the typewritten provision is assumed, in the absence of any proof to the contrary, to express the intention of the parties and must prevail herein.

3. The contract between plaintiff and defendant, as [90] written, evidenced the intention of the parties and provides that defendant shall pay damages caused by the late delivery of materials to the plaintiff.

4. There was a valid consideration for the special damage clause on the signature page of the contract.

5. The contract was breached by the defendant because of his delays in the delivery of water wall tubes and headers.

6. Plaintiff cannot recover damages in excess of \$10,008.70, this being the amount specified in its original claim dated June 30, 1945 (plaintiff's Exhibit 35).

7. Plaintiff cannot recover on any element of damages not included in its claim of June 30, 1945.

8. Plaintiff is not entitled to recover under Counts II and III.

9. Plaintiff is entitled to recover, under Count I of its petition, damages in the sum of \$3,753.15, with interest thereon at the rate of 6% per annum

from March 18, 1946, and for its costs herein incurred, including the cost of preparing the transcript, to-wit, \$808.30, as stipulated by counsel at the trial.

Dated at San Francisco this 30th day of April, 1948.

CHASE A. CLARK,

United States District Judge.

[Endorsed]: Lodged 4-20-48. Filed May 7, 1948.

In the District Court of the United States for
the Northern District of California, Southern
Division.

No. 26113-R

POWER SERVICE CORPORATION,
a corporation,

Plaintiff,

vs.

W. E. JOSLIN, doing business as
CORY-JOSLIN AND MACNSONS,

Defendant.

DECREE

Now on this 7th day of May, 1948, this cause having been submitted to the Court upon the pleadings, the evidence adduced by the parties and the briefs of counsel, and the Court being fully advised in the premises, and having made formal Findings of

Fact and states its Conclusions of Law in writing and filed the same,

It is hereby ordered, adjudged and decreed:

1. That, under Count I of Plaintiff's petition, plaintiff have and recover of and from the defendant the principal sum of Three Thousand Seven Hundred Fifty Three & 15/100 (\$3,753.15) Dollars, together with interest thereon at the rate of 6% per annum from date hereof until paid.

2. That Counts II and III of plaintiff's petition be and the same are hereby dismissed.

3. That the costs of this suit, including the cost of preparing a transcript in the amount of \$808.30 be taxed by the Clerk against the defendant, for all of which let execution issue.

4. That the total costs taxed by the Clerk are \$607.82.

Dated May 7, 1948.

CHASE A. CLARK,
United States District Judge.

[Endorsed]: Filed May 7, 1948. [92]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Power Service Corporation, a corporation, plaintiff in the above-entitled cause, hereby appeals to the United States Circuit Court of Appeals, for the Ninth Circuit, from that part of the final decree and judgment dated and entered in this action on May 7, 1948, designated as paragraph "1," which awards plain-

tiff damages in the amount of Three Thousand Seven Hundred Fifty-three & 15/100 Dollars (\$3753.15) instead of the amount of damages established by the evidence in this cause, to-wit, Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88).

/s/ LANCIE L. WATTS.

[Endorsed]: Filed May 27, 1948. [93]

[Title of Court and Cause.]

APPELLANT'S STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are that the Trial Court erred:

1. In awarding plaintiff damages in the amount of Three Thousand Seven Hundred Fifty-three & 15/100 Dollars (\$3753.15) instead of in the amount of damages established by the evidence, to-wit, the sum of Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88).

2. In its Findings of Fact No. 32 holding that appellant was delayed only two days on Boiler No. 1, instead of sixteen days as shown by the evidence.

3. In its Findings of Fact No. 33, holding that appellant was delayed only seven days on Boiler No. 2, instead of thirty-seven days as shown by the evidence.

4. In its Findings of Fact No. 34, holding that appellant was delayed only six days on Boiler No. 3 instead of forty-four days as shown by the evidence.

5. In its Findings of Fact No. 35, holding that appellant was delayed a total of only fifteen days in completing its contract, and in the court's failure to find from the evidence that the appellant was delayed from November 10, 1944, to December 19, 1944, a total of thirty-nine days.

6. In its Findings of Fact No. 39, in which the court arbitrarily determined that the loss to appellant amounted to Two Hundred Fifty & 21/100 Dollars (\$250.21) daily, and in its failure to find from the evidence that the total damages amounted to Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88) made up of the following distinct and clearly established items of damage, to-wit:

Item 1: Extra cost of equipment rental.	\$ 2,255.50
Item 2: Extra cost of supervisory personnel (except Borst)	8,267.53
Item 3: Extra cost of 90 days additional time and expense Borst.....	2,542.31
Item 4: Home Office overhead.....	6,649.82
Item 5: Loss in Efficiency.....	14,611.72
	<hr/>
	\$34,326.88

7. In its Conclusion of Law No. 5, insofar as the Court held that plaintiff's damages were limited to the amount set forth in its amended claim.

8. In its Conclusion of Law No. 6, holding that appellant could not recover in excess of \$10,008.70, being amount specified in its original claim dated June 30, 1945 (plaintiff's Exhibit 35).

9. In its Conclusion of Law No. 7, holding that

appellant could not recover on any element of damages not included in its claim of June 30, 1945.

10. In that part of its Conclusion of Law No. 9 which held that appellant was entitled only to recover damages in the amount of Three Thousand Seven Hundred Fifty-three & 15/100 Dollars (\$3,753.15), instead of Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88), as established by the evidence.

11. By disallowing, in its computation of damages, all overhead expenses established by the evidence, to-wit, the sum of Six Thousand Six Hundred Forty-nine & 82/100 Dollars (\$6,649.82).

12. In that its opinion and decree are not supported by evidence and are contrary to law.

13. In that its opinion and decree are not supported by its Findings of Fact.

14. In that its opinion and decree are contrary to its Findings of Fact and the law. [100]

14. In that its decree as to the amount of delay and the measure of damages is clearly erroneous and is not based upon substantial evidence.

LANCIE L. WATTS,

Attorney for Appellant.

SERVICE STATEMENT

A copy of the foregoing Appellant's Statement of Points was mailed, by registered mail, on May 26, 1948, to the following named counsel for the defendant, to-wit:

1. To Frank J. Hennessy, United States Attor-

ney, attention Rudolph Scholz, 422 Post Office Building, San Francisco 1, Calif.

2. To Paul B. Gibson, Humboldt Bank Bldg., San Francisco, Calif.

LANCIE L. WATTS,
Attorney for Plaintiff.

[Endorsed]: Filed May 27, 1948. [101]

[Title of District Court and Cause.]

ORDER

The above-captioned cause having been appealed to the Ninth Circuit Court of Appeals, it is hereby ordered that all original exhibits offered and received in evidence in said cause in the trial court be transmitted to the Ninth Circuit Court of Appeals for its inspection.

Dated May 26th, 1948.

/s/ CHASE A. CLARK,
United States District Judge.

[Endorsed]: Filed June 4, 1948. [102]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby ordered that the plaintiff, appellant herein, may have

to and including the 6th day of August, 1948, to file the record on appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: June 30th, 1948.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed June 30, 1948. [105]

District Court of the United States, Northern
District of California

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 105 pages, numbered 1 to 105, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Power Service Corporation, a corporation, Plaintiff, vs. W. E. Joslin, doing business as Cory-Joslin and Macnsons, Defendant, No. 26113 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$42.00 and that the said amount

has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 21st day of July, A. D. 1948.

(Seal)

C. W. CALBREATH,
Clerk.

/s/ W. E. VAN BUREN,
Deputy Clerk. [106]

In the District Court of the United States, in and for the Southern Division of the Northern District of California.

THE POWER SERVICE CORPORATION,
a corporation,

Plaintiff,

vs.

W. E. JOSLIN, doing business as
CORY-JOSLIN & MACNSONS,

Defendant.

REPORTER'S TRANSCRIPT

This matter came regularly on for hearing before the Honorable Chase A. Clark, District Judge, sitting without a jury, at San Francisco, California, on March 18th, 1947.

Appearances: Lencie L. Watts, Esquire, 801 Searritt Bldg., Kansas City, Mo., Attorney for Plaintiff; Frank J. Hennessy, U. S. District Attor-

ney for the Northern District of California, Room 422 P. O. Bldg., San Francisco; Rudolph Scholz, Esq., 422 P. O. Bldg., San Francisco, Cal., Assistant U. S. District Attorney; Paul B. Gibson, Esq., Humboldt Bank Building, San Francisco Cal., Attorneys for the Defendant. [1*]

March 18th, 1947—10:00 a.m.

(Opening statement and explanation of the relationship of the parties made by Mr. Watts.)

Mr. Scholz: With the consent of the Court and counsel I would like to amend the answer by including for a separate defense, each count, the following: "That the defendant alleges that there was no consideration to the defendant for the addenda or additional clause to the signature page of the contract of the parties hereto."

The Court: Well, the answer may be so amended.

Mr. Scholz: And I will file a written amendment later before this trial is over. Also, counsel for the plaintiff has stated in the opening brief, or the pre-trial brief, which he has filed that there are three counts based on the contract, that is, in Count One of the Petition he asks for damages, and if the Court does not find that he is entitled to damages under the contract, then he asks for a reformation of the contract and for damages. Now, we are confronted, first, with the question,—Does

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

the contract provide for damages? And at this time I would like to make a motion for judgment on the pleadings, and for the record I would like to point out that in the pleadings they have set up, or pleaded, the contract, or a portion of it; that is, [5] they have specifically set forth certain paragraphs of the contract. The first paragraph of the contract as set forth in the Petition deals with the question of furnishing materials, and states that the materials are to be furnished by the constructor. The next paragraph of the contract which is set forth in the Petition is "immediately after starting work under the sub-contract, the sub-constructor shall prepare a list of materials, including accessories and equipment required, and shall check this list against the materials, accessories and equipment stored in or adjacent to the power house in order that shortages may be immediately determined. Such shortages will then be reported to the constructor for use in obtaining the balance of materials required for the completed works." And then it goes on further to state, "such an inventory will be kept current by the sub-constructor during the progress of the work, and the sub-constructor will be held responsible for advising the constructor of his requirements sufficiently in advance of the time such items will be required to enable procurement without delaying progress." The next paragraph states, "nearly all of the materials required for the work has been stored in power house number one, or in warehouses adjacent thereto." And the balance of that paragraph is not material for

this motion. Then it goes on to quote other portions of the contract, and it comes to what [6] I consider the meat of this motion. It is paragraph "E" of the portion of the contract set forth in the Petition under paragraph four of the Petition, and reads, "in case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the sub-constructor will accept the additional time in which to complete his sub-contract in full satisfaction of any delays encountered, and the constructor will not be liable for any costs or expenses incurred by the sub-constructor as a result of the increased time for completion of the sub-contract." And paragraph "G" is, "No liquidated damages are provided for under the specifications, nor will such damages be provided for in the sub-contract." The contract goes still further and states that under a lump sum contract the sub-contractor has read and is familiar with each and every part of the said sub-contract, and the respective rights, powers, benefits, obligations and liabilities of the United States of America herein called "The Government," and the "Constructor," who in this case is Joslin and the A. E. M., and then it refers to Article VI which is not included; in paragraph 105 is included the paragraph, or sub-paragraph, to which I have called your attention. Article VI, which is now a part of the sub-contract reads, or provides that all disputes concerning questions of fact arising under this [7] sub-contract shall be decided by the contracting officer, whose decision shall be in

writing subject to appeal by either party hereto within thirty days from the receipt of the contracting officer's decision, to the Chief of Engineers, whose decision shall be final and conclusive on the parties hereto. Article V provides that in consideration of the sub-contractor's undertaking hereunder, the sub-contractor shall receive payment for work performed at the lump sum amount set forth in Article I hereof, which shall constitute full compensation for the performance by the sub-constructor of the work and services authorized herein, unless otherwise provided in the specifications. After this offer and acceptance was made, but before the formal contract was signed, there was added to the signature page of the contract the following clause: "This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials, notwithstanding the provisions of paragraph one hundred and five of the specifications." It is our theory that under this contract the plaintiff is not entitled to damages at all. As set forth in Article V the sub-contractor shall receive payment for the work performed at the lump sum amount set forth in Article I., and then in paragraph "G", or subparagraph "G" of 105 no liquidated damages are provided for under the [8] specifications, nor will such damages be provided for in the sub-contract. It is admitted that under the contract without the additional clause that they are not entitled to dam-

ages at all, but their contention is that this clause permits them to sue, prove and collect damages by reason of any late delivery of materials, notwithstanding the provision of Paragraph 105 of the specifications. We contend that it means nothing, because it states that it is signed without intent to waive any right which it may have to prove and collect damages. It is their intent to waive all provisions of Paragraph 105. Now, if we can have a decision on that, then we can proceed to the next question.

The Court: I will pass on that in the final determination of this case. I might say that the case is entirely new to me. However, I observe that Judge Roche over-ruled this motion without prejudice to your raising the question again, and I will determine this question in passing upon the entire case. In making a final determination of the case I will pass on it, because at this time it would require me to take snap judgment, and my opinion now is that I will require you to explain why that clause is in the contract.

Mr. Scholz: Very well. If the Court is reserving his ruling on that, Mr. Gibson will make the opening statement. He is Mr. Joslin's personal attorney. [9]

(At this time Mr. Gibson made an opening statement, or a statement explaining the position of the defendant.)

W. LYLE BORST,

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Watts:

Q. Where do you live, Mr. Borst?

A. Minneapolis, Minnesota.

Q. What is your occupation?

A. Mechanical engineer.

Q. With whom, and by whom, are you employed? A. The Power Service Corporation.

Q. In what capacity?

A. As Chief Engineer. [10]

Q. Will you tell the Court whether or not the work provided for in each one of the three of these modifications as represented by Modifications 1, 2 and 3, in any way delayed the performance beyond the one hundred twenty day period provided for in the contract?

A. No, sir; it was such that it could be done, and was done simultaneously with the regular contract.

Q. What was the date upon which completion should have been established on this contract?

A. November 10th, 1944. [103]

Q. Did you read paragraph 5-04 "B" which provided that you should prepare a list of the materials? A. Yes, sir.

The Court: Before you go into that, Mr. Watts.

(Testimony of W. Lyle Borst.)

were these change orders completed before the expiration of the 120 days period?

A. The change orders, as such, were completed simultaneously with the rest of the work which was on December 19th.

Mr. Gibson: They were not within the time of the contract.

Q. (Mr. Watts, continuing): Now, I would like for you to give the Court just some idea, very briefly, of the magnitude of the task of making this inventory as a part of your performance of the contract.

Mr. Scholz: Under the specifications given to the plaintiff at the time of the bid, it called for all of this inventory; whether it was a large or small job would have no bearing on this case.

The Court: I think it is immaterial, but he may answer.

A. This work involved going through the materials on hand in the power house proper and in the lot and the area adjacent to the power house, and in warehouses adjacent thereto. It meant a,— [104]

Q. (Interposing): First, tell the Court what was done with respect to the requirement that you make up a complete inventory from the plans and specifications.

A. We took the plans and specifications and our engineering organization in Minneapolis set about to list materials necessary for this work. It was a matter of writing up a proper list of basic materials as shown on the drawings.

(Testimony of W. Lyle Borst.)

Q. In compliance with that provision, did you prepare Exhibit No. 19? A. Yes, sir.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 19, for purposes of identification.)

Q. (Mr. Watts, continuing): Will you identify the exhibit?

A. This is a list showing the piping materials which were taken off the blue prints for the job.

Q. Under whose direction was this prepared?

A. Under my direction.

Q. Where? A. In the Minneapolis office.

Q. When?

A. Immediately following the awarding of the contract.

Q. After you prepared that list what did you do with respect to that part of your specifications which required you to take a field inventory and check it against this material listed which was made in your home engineering office? [105]

A. I set about that with the aid of men we hired going through the material on hand and making a list of those materials, assigned numbers to all the materials which were shown on the list, so that we could identify these materials in the process of using them.

Mr. Watts: I now offer in evidence Exhibit No. 19.

Mr. Scholz: Apparently this was prepared over a period of time by different people?

(Testimony of W. Lyle Borst.)

Mr. Watts: He testified that it was under his direction by engineers in his home office.

Mr. Scholz: What engineers were they in your home office?

A. Mr. Forkey,—N. D. Forkey, and H. E. Brokoff,—I think maybe Mr. Forkey's initials will appear on the work sheets.

Q. (Mr. Watts, continuing): When did this work start? A. About the 13th or the 14th.

Q. Will you tell the Court whether or not each page of this document,—all of the pages included in Exhibit No. 19 have been dated?

A. Yes, sir.

Mr. Watts: We offer this in evidence.

The Court: Is there any objection to the admission of this exhibit? [106]

Mr. Scholz: Nothing, except the standing objection. Of course, we cannot see the materiality of it.

Mr. Watts: We were required to perform this contract and one of the things was the preparing of this list.

Mr. Scholz: I think we have admitted that you did prepare an inventory.

The Court: I think I will admit the exhibit.

(Whereupon Plaintiff's Exhibit 19, so marked for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): Will you tell the Court what the typewritten part of the exhibit refers to?

A. Yes. The typewritten part refers to the

(Testimony of W. Lyle Borst.)

take-off, or the listing of the material as it came from a perusal of the drawing. There is a column showing the total quantity of the material required, and then we set about to determine what material was available. Now then, for example, you notice on the first item there are three on the job, which corresponds to the description of the number required, so it meant that we didn't require any additional material of that kind; and so we have a zero in that column under the particular description.

Q. Where did you get the information from which these pencil notations were made on Exhibit No. 19?

A. This information was obtained by going through the [107] material at the site, and taking a list as prepared there, and comparing it as against this list marking down the material as it was found, and thereby getting a cross-check.

Q. And what was done with this list after they were posted to this Exhibit No. 19?

A. They were in pencil form, and we didn't keep those lists.

Q. Does Exhibit No. 19 show the missing items required that you had to requisition?

A. Yes, sir.

Q. In what manner did you notify the defendant that this missing material was required?

A. We filed that formal requisition, or forwarded it to Cory-Joslin showing the material required on the job.

(Testimony of W. Lyle Borst.)

Mr. Scholz: You mean by "missing," that it was not on the site?

A. Yes, sir; not on the site at all.

Q. (Mr. Watts, continuing): Now, will you relate exactly what you did to get the missing material?

A. We wrote a formal requisition to Cory-Joslin of the exact items, and they were listed, of the materials that we needed.

Q. Exhibit No. 20, Mr. Borst, will you identify that?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 20, for purposes of identification.) [108]

A. That comprises copies of our requisitions made to Cory-Joslin.

Q. Those were made over what period of time—about how many of them?

A. They were made immediately upon starting the job, the earliest one was on July 26th, I believe.

Q. And did you continue to furnish those requisitions to the defendant throughout this contract?

A. Yes, sir; we kept them current.

Q. And how quickly would you get this material?

A. Well, this would come in within hours, some of it, and from hours up to two or three days.

Q. Where would these materials be obtained?

A. Ordinarily obtained from the main supply

(Testimony of W. Lyle Borst.)

ordnance at Sunflower. Some was pick-up materials from the storehouse and supply depot, where these materials could be drawn from.

Q. Will you explain the general nature of most of the material in Exhibit No. 20?

A. A great deal of this material consisted of pipe, valves, and fittings, gaskets, hangers, and raw material, such as angle-iron, and gasket materials.

Mr. Watts: We offer in evidence Plaintiff's Exhibit No. 20. It is simply offered for the information of the Court.

The Court: Is there any objection, Mr. Scholz?

Mr. Scholz: No objection, your Honor.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 20 so marked for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing:) Now, Mr. Borst, I am reading the following from the provisos and specifications—it is paragraph 1-10 on page 1-5 of Exhibit No. 2, and it comes under the heading, "Organization, Plant, and Progress:" " 'K.' The subconstructor shall within seven days after receipt of the notice to proceed, prepare and submit to the constructor for approval a practical and feasible schedule showing the order in which the subconstructor proposes to carry on the work, the date on which he will start the several salient features (including procurement of plant and equipment) and the contemplated dates for completing

(Testimony of W. Lyle Borst.)

the same. The schedule shall be in the form of a progress chart of suitable scale so as to indicate approximately the percentage of work scheduled for completion at any time. The subcontractor shall enter the actual progress at the end of each week, and shall immediately deliver to the constructor three blue print copies of the same." Now, Mr. Borst, I want you to first tell the Court what you did with reference to complying with that provision of the contract?

A. At the very outset of the work I set about to prepare [110] this progress schedule.

Q. When, with reference to July 13th, the date you received notice to proceed, was it that you commenced work on that progress schedule—where did you do it, and when?

A. I began the work on that definitely about July 14th, or 15th. It was before we had been able to set up a field office. Mr. Smith of Broderick & Gordon people was kind enough to let me use a desk in his office for a period of days, and I used that space and worked on that progress chart. Most of the time I was in that office.

Q. Mr. Borst, please identify Exhibit No. 50 for the record.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 50, for identification.)

A. That is a copy of the progress schedule that I prepared, and it has been marked with colored

(Testimony of W. Lyle Borst.)

pencil to show modifications made while it was under discussion.

Q. Tell the Court when the first copy of the progress schedule was delivered to the defendant in this case, with reference to July 13th, 1944.

A. That was within seven days.

Mr. Scholz: What is the date of that progress schedule?

A. This particular schedule that I have here does not bear any formal date, other than this: It has a crayon written [111] date of August 17th, 1944, and in the same notation it says "Final, as revised." At that time the matter of satisfaction to all of the parties concerned relative to the final sheet of this schedule had been determined, and I had put this modification date on this.

Mr. Scholz: The date is August 17th.

A. Yes.

Mr. Watts: I now call upon counsel for the defendant to produce, in accordance with the subpoena, and notice served upon counsel, to produce the original schedule delivered by Mr. Borst before any revision was made.

Q. (Mr. Watts, continuing:) Mr. Borst, will you please tell the Court when you delivered the first copy of that construction schedule to the defendant? A. That is the first draft.

Mr. Scholz: He didn't ask for the first draft, and we object to that as not being responsive.

(Testimony of W. Lyle Borst.)

The Court: If you understand the question, Mr. Witness?

A. Perhaps, I am a little confused.

Q. (Mr. Watts, continuing:) When did you deliver the first draft of the progress schedule to the defendant in compliance with the provisions of the contract?

A. Within the seven day period.

Q. What happened so far as approval of it is concerned [112] after you delivered it to the defendant?

A. That first draft gave rise to several conferences, and the parties thereto asked for a revision on my part.

Mr. Scholz: You mean you had a conference with Joslin and he asked for a revision of that?

Mr. Watts: Now, Mr. Scholz, if you will just let me develop this?

Mr. Scholz: I think it is objectionable on account of the fact that we don't understand what he means by "they" or when he says "The Parties."

A. Representatives of the Cory-Joslin people, Mr. Wedlick and I would point out that the Army Engineer, Major Matthews, was the final party with whom those things were to be satisfactory, and his satisfaction was to be passed on through the Cory-Joslin people, so that any conferences we had, were held jointly with the Cory-Joslin people, and the Major was there, too.

Q. (Mr. Watts, continuing:) Did you submit

(Testimony of W. Lyle Borst.)

that progress schedule—just tell the Court whether or not you had learned that there was a shortage of water-wall tubes and headers before you submitted that progress schedule?

A. Yes, sir; we did.

Q. Did you shortly thereafter, and before the defendant and the Government approved the schedule you had submitted to them, did you write a letter to the defendant putting them on [113] notice of the missing materials, to-wit: The tubes and the headers?

A. Yes, sir. It was common knowledge.

Q. Will you identify Exhibit which has been marked No. 4?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 4 for purposes of identification.)

A. That is a letter written by the Power Service Corporation to Cory-Joslin & Macnsons at the Sunflower Ordnance Works.

Mr. Watts: I offer in evidence now Plaintiff's Exhibit No. 4.

The Court: Do you have any objection?

Mr. Scholz: None.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 4, so marked for identification, was admitted in evidence.)

Mr. Watts: This is a letter signed by Mr. Borst. It is dated July 26th, 1944, and addressed to Cory,

(Testimony of W. Lyle Borst.)

Joslin & Macnsons, Sunflower Ordnance, in care of William F. Lozier, Incorporated, Broderick & Gordon, Kansas City, Missouri, and is as follows:

"Gentlemen:

"In connection with our subcontract for complete erection of boilers in Power House No. 1, Sunflower Ordnance [114] Works, Johnson County, Kansas, we wish to advise of a major shortage of materials which will delay the progress of our work beyond our contract schedule.

"This material consists of water-wall tubes for all three of the boilers which we are to erect. In order for us to complete our work in the one hundred twenty days period required, it will be necessary for us to have delivered to the job sufficient tubes for one boiler by August 1st, 1944; sufficient tubes for a second boiler by August 8th, 1944; and the balance of the tubes for the third boiler by August 15th, 1944.

"Very truly yours,

POWER SERVICE CORP.,

W. LYLE BORST,

Chief Engineer."

Q. (Mr. Watts, continuing:) Did you get a response to this letter? A. Yes, sir.

Q. Identify Exhibit No. 5, for the record, if you will, Mr. Borst?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 5, for purposes of identification.)

(Testimony of W. Lyle Borst.)

A. That is a letter from Mr. Wedlick to the Power Service Corporation.

Q. And now, will you please identify Exhibit marked No. 6? [115]

(Whereupon document referred to was marked Plaintiff's Exhibit No. 6, for purposes of identification.)

A. That is a copy of a letter from Mr. J. S. Hagan, Chief Engineer, to Mr.—to Cory, Joslin.

Q. Did Exhibit No. 6 accompany Exhibit No. 5 when you received it?

A. Yes, sir; they did.

Mr. Watts: We offer in evidence both of these Exhibits as No. 5 and No. 6.

The Court: Is there any objection?

Mr. Scholz: No objection so far as Exhibit 5 is concerned, but as to Exhibit No. 6, we make the same objection, unless they connect it up with the defendant in this case.

The Court: Both of the exhibits may be admitted at this time.

(Whereupon Plaintiff's Exhibits 5 and 6, so marked for identification, were admitted in evidence.)

dence.) [116]

Q. (Mr. Watts, continuing:) Up to that moment had this progress schedule been approved by any of the parties involved in this case?

A. No, sir; it had not.

(Testimony of W. Lyle Borst.)

Mr. Watts: And attached to this letter is a letter from Mr. Hagan which reads:

“The effect of the shortage of water-wall and roof tubes for Combustion Engineering Company’s boilers, and the completion of Power House No. 1 has been broached in Power Service Corporation’s letter of July 26th, 1944, to you.”

This is addressed to Cory, Joslin & Macnsons, and is, as I said, from Mr. Hagan, their Chief Engineer.

“Although it is desirable to have all the materials on hand at the start, an analysis of the usual construction procedure for boilers of this type, and local conditions, indicates that the ultimate one hundred twenty day completion period will not be affected if the above tubes for the first boiler are delivered on the job by August 15th, 1944, and the tubes for the other two units are delivered in successive intervals of about one week.

“I don’t believe that the water-wall and roof tubes [117] should, or could, be erected until the boiler tubes are installed, due to interference in handling and safety hazards.

“The progress of the work indicates that no ultimate delay would result if the tubes for one boiler are delivered by August 15th, 1944, and the balance in order.

/s/ J. S. HAGAN.”

Q. (Mr. Watts, continuing:) With respect to this letter, Mr. Hagan’s position was that the tubes

(Testimony of W. Lyle Borst.)

for the first boiler should be received August 15th and tubes for the second on August 22nd, and for the third boiler on August 29th. What did your original schedule provide as to when these tubes should be received?

Mr. Scholz: We object to this as the schedule would be the best evidence.

The Court: Yes; that is right.

Q. (Mr. Watts, continuing:) Does this original schedule, Exhibit No. 50, indicate the date on which the tubes were required for these three boilers?

A. Yes, sir. I have a column under that heading indicating Boiler No. 1, Boiler No. 2, and Boiler No. 3. This is under "Steam Generating Units," and is broken down "to putting in water-wall tubes," and there I have indicated the three boilers again. Here we have the system of charting. Each of these [118] little lines is a day, and this space in here (indicating) comprises a month, so that you see in working here, I indicate that we would require water-wall tubes for this boiler on the 26th of July, the next on the 27th, and the third about the 8th of August.

Q. As a result of this letter by Mr. Hagan in which he insisted on the first one, that is, the tubes for the first boiler be set up to August 15th, 1944, and the second to August 22nd, and the third to August 29th, will you tell the Court whether or not a controversy arose over the approval of the schedule that you prepared?

(Testimony of W. Lyle Borst.)

A. Yes, sir; that is correct. There was a discussion.

Q. As a result of that, will you tell the Court whether the original construction schedule that was submitted about July 20th, 1944, was subsequently revised?

A. Yes, sir. That is what I have here.

Q. I ask you to identify this exhibit which has been marked No. 51.

(Whereupon document referred to was marked Plaintiff's Exhibit 51 for purposes of identification.)

A. This is the final form of the progress schedule as worked out and revised on August 17th. It is simply a permanent, or tracing, from which these blue prints are made, and is exactly as shown by the crayon lines on this other exhibit. [119]

Q. Point out to the Court what you mean.

A. Well, you can see that this was marked. There is a change from here (indicating) to the first of August; on this same line appears as a correction on the first of August. The final draft was so made.

Q. Whose duty was it to finally approve the construction or progress, schedules which you submitted?

A. Major Matthews of the Area Engineer's Office.

Q. What date did he approve those?

A. The revised schedule, on August 17th.

(Testimony of W. Lyle Borst.)

Mr. Scholz: In view of that fact, I move to strike all of the testimony regarding the schedules. We now have the date. Apparently, they had a consultation and agreed upon the schedule. It has finally developed that this was the final schedule, and I don't think these conversations or conferences are material in this case.

Court: I will let the evidence stand, with the understanding, of course, that it is consummated in this approval.

Mr. Watts: Our purpose is to rebut the statement made by counsel that we delayed in furnishing these schedules.

The Court: Very well, gentlemen. You may proceed.

Q. (Mr. Watts, continuing): I hand you exhibit marked No. 52, and I will ask you to identify that for the record, Mr. Borst. [120]

(Whereupon document referred to was marked Plaintiff's Exhibit No. 52 for purposes of identification.)

A. That is a construction schedule for the Power Service Corporation as made up in the Area Engineer's Office, or in the office of Lozier, Broderick & Gordon. It is a compilation of the information of our own schedule, and takes the form which is common to all of the schedules that we used throughout the work on the area. It was commonly used. Major Matthews employed this in his office so that he could—

(Testimony of W. Lyle Borst.)

Mr. Scholz (Interposing:) We object to that as not binding on the defendant, and also by reason of the fact that it was not made in the presence of this witness.

The Court: It does seem immaterial so far, but I think it may stand.

A. (Continuing:) This schedule bears the approval of Major Matthews of the Engineering Corps and shows my schedule and the signature as of August 17th, 1944. The signature of Major Matthews is shown as of August 22nd, 1944, and the date of the report is August 18th, 1944.

Q. (Mr. Watts, continuing:) Now, Mr. Borst, tell the Court what finally happened with respect to this controversy, or discussion referred to in the letter with Mr. Hagan where he insisted that the tubes for Boiler No. 1 could be delivered by August 15th, and the next on August 22nd, and the next on August 29th. What was the schedule finally approved of by [121] all of the parties to this litigation.

Mr. Scholz: We object to that, unless he states the time, the place and who were present at these conversations.

Q. (Mr. Watts, continuing:) Relate just what transpired from the time the first draft of this schedule was presented until it was finally approved by the Government with respect to Mr. Hagan's participation, and Mr. Wedlick's participation in agreeing upon the production schedule.

(Testimony of W. Lyle Borst.)

Mr. Scholz: Now, we object to that. It does not show who was present at the time.

A. I can tell you that.

The Court: Just go ahead then.

A. At this date, on the 17th, the date on which that schedule was approved, there was a meeting at which were present Mr. Wedlick, representing Cory, Joslin; Major Matthews and Mr. Hagan, and I think Mr. Thomas was there, too. He had charge of working out this particular form of schedule. I think that was in Thomas' office. If I remember distinctly, that is where it was. That day when we came to an agreement, and the approval of the schedule—the dates I have established on the chart, August first for the first boiler; August 7th for the second, and August 15th for the third, would be the controlling dates.

Q. (Mr. Watts, continuing:) Was Mr. Wedlick at that conference? [122] A. Yes, sir.

Q. Did he agree to that schedule the same as you? A. Yes, sir.

Q. And he represented Cory-Joslin?

A. Yes.

Q. Was that the last of a number of meetings in connection with the schedule? A. Yes, sir.

Q. Was the real progress chart, as distinguished from the progress schedule, made by showing exactly how far you had progressed each week thereafter? A. Yes, sir.

Q. Will you tell the Court what Exhibit No. 52 is, that is, as illustrative of these charts?

A. From the data contained here—first, we will

(Testimony of W. Lyle Borst.)

call attention to the weekly charts. This line here (indicating) represents the entire work for the job, and it consists of only an outline block stretching from the time of starting on the 13th of July to the 10th of November. Now this is further broken down to six divisions: The piping systems; the pipe covering and installation; Boiler No. 1, steam generating unit; Boiler No. 2; Boiler No. 3, and auxiliary equipment. Now under Boiler No. 1 the first item, "set drums, tubes, water-wall headers and tubes;" this means that the work [124] of setting the drums, water-wall tubes and headers, was to be done here (indicating). The setting of the pulverizers, burners and soot-blowers was of this date (indicating), and the setting of the brick work on this date (indicating). This was to be the finish. The boiler exterior casing was of this date indicated by these blocks, and there is also the ash-hopper lining, induced and forced draft fans and drives, and the dryout. There was submitted weekly by the inspector and engineer, or the resident engineer for Broderick & Gordon a report which was checked by myself of the actual progress made during the week on the work there, on the various kinds and characters of work, and this was set down each week in the form of black lines showing the percentage of completion, and there was simultaneously set down in this chart a cross-hatch line which would show the amount of work that should have been done, or that would be expected, to keep the work up to schedule. There is also a curve shown

(Testimony of W. Lyle Borst.)

on this chart which starts at the bottom and ends in here (indicating) near the top of one hundred per cent, showing the trend which the job would have to follow if it were to be considered on schedule. On this particular week, which was August 22nd, we were behind schedule in this amount—first, we will take this curve here (indicating). We will represent that as curve “A” for identification. Now this curve “A” represents the over-all progress which should [124] be made between the starting time of July 13th and the date of November 10th, in which time one hundred per cent of the entire job should be completed. At this particular date this report is dated August 18th, and on this date we have progressed as is indicated by the curve, which we will indicate as curve “B” on the chart, and this curve shows that we had reached on August 18th about nineteen and one-half per cent complete on the job, at that particular time, and as of that date curve “A” would show that we should have completed about twenty-four per cent of the job. That same information is shown on the chart. At the top is an outline which we will indicate as “C”, and is designating the total contract. The black line under that curve “C” shows us to be some fifteen per cent complete, while the cross-hatched lines indicate that we should have been nineteen and one-half per cent complete.

Q. Let me interrupt, Mr. Borst: Was it possible for you to look at the progress chart, and was it possible for Mr. Wedlick to look at the progress

(Testimony of W. Lyle Borst.)

schedule and chart and tell on each day what type of work was to be performed according to this progress chart and schedule, and what type of material must be on the site for the installation, according to the chart?

A. Yes, sir; it was possible.

Q. Was that the purpose of it?

A. Yes; that was the purpose. [125]

Q. (Mr. Watts, continuing:) Were there any requirements made upon you that you submit this original progress schedule, and make what we call a progress estimate, or break-down, and deliver it to the defendant in this case?

Mr. Scholz: I submit that what was required is in the specifications, and of course that is the best evidence.

The Court: That may be true, but I will permit him to answer.

A. We did comply in submitting the break-down as required in the contract.

Q. Will you identify Exhibit No. 10, if you please?

(Whereupon document referred to was marked Plaintiff's Exhibit 10, for purposes of identification.)

A. Yes, sir; this is a letter which we wrote to Cory-Joslin giving this information.

Q. And the date of that letter?

A. August 10th, 1944.

Mr. Watts: We offer Exhibit No. 10 in evidence.

(Testimony of W. Lyle Borst.)

The Court: Do you have any objection?

Mr. Scholz: We have no objection. [126]

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 10 so marked for identification, was admitted in evidence.)

Mr. Watts: It is a letter dated August 10th, and written by the Power Service Corporation to Cory, Joslin & Macnsons, for the attention of Mr. F. V. Wedlick:

"RE: Completion of Power House No. 1, Lump Sum Subcontract No. 5 to Fixed Fee Subcontract No. 5." and the first paragraphs read as follows:

"Gentlemen:

"We submit herewith the following revised break-down of our total contract price to agree with the items listed on our progress schedule chart. This method of outlining of our progress estimates break-down was discussed with Mr. Hagan and Mr. Thomas of Lozier, Broderick & Gordon.

"Please void or destroy our original progress estimate break-down submitted with our letter of August 7th, 1944.

"Progress estimate breakdown. REvised August 10th. Completion of Power House No. 1, Sunflower Ordnance Works, Johnson County, Kansas, Power Service Corporation, Lump Sum Subcontractor, L. S. Subcontract No. 5 to F. F. Subcontract No. 5. Lozier, Broderick & Gordon, Architect-Engineer-Manager, Prime Contract No. W-461-Eng-10274. Cory, Joslin & Macnson, constructor, Fixed Fee Subcontract [127] No. 5 (mechanical)." and then

(Testimony of W. Lyle Borst.)

follows the break-down, showing the price opposite each type of work which aggregated the total of \$448,000.00.

Q. (Mr. Watts, continuing:) I think you testified that this chart shows the exact date upon which the company must have present enough labor to perform the contract in the one hundred and twenty days schedule? A. Yes, sir.

Q. It indicates the date upon which the defendant is required to furnish the material so that the contract may be completed in the one hundred and twenty day scheduled, does it not?

Mr. Scholz: We object to that as leading.

Mr. Watts: I agree. It is leading.

Q. (Mr. Watts, continuing:) What does this chart show so far as the obligation on the part of the defendant is concerned to furnish material?

Mr. Scholz: The question is objected to, as the chart is the best evidence.

The Court: Of course that would be understood by the Court.

Q. (Mr. Watts, continuing:) Let us take, for example, Mr. Borst, the tubes of boiler No. 1, when does the chart show that the tubes for boiler No. 1 must be present? [128]

Mr. Scholz: We object to that. The contract specifies the terms, and not the chart, and if it is in the chart, then it is the best evidence.

The Court: Does the chart show it?

Mr. Watts: Yes, and it is made in conformity with the contract.

(Testimony of W. Lyle Borst.)

The Court: Then the chart, of course, is the best evidence.

Q. (Mr. Watts, continuing:) Will you indicate where the chart indicates that, so far as the Power Service Corporation is concerned, and the defendant is concerned—that is, when the material was to be delivered to them, or by them, and I understand, Mr. Borst, you are now referring to Exhibit No. 52?

A. Yes, I am. And on this particular account, we have here “tubes,” under boiler number one, “Water-wall headers and tubes.” That whole group must be there at the date indicated.

Q. On what date?

A. Starting in as of July 19th. The pulverizers and exhausts start on July 31st.

Q. Were the tubes available in accordance with that schedule chart on the 19th of July?

A. No, sir; we didn't receive those.

Q. Were the weekly schedules, or weekly charts, made up during each week showing the exact amount of progress [129] made by your organization?

A. Yes, sir; that is right.

Q. I now hand you Exhibits No. 53 to 63, inclusive, and I will ask you to identify these for the record.

(Whereupon documents referred to were marked Plaintiff's Exhibits 53 to 63, inclusive, for identification.)

A. These are charts which the company forwarded each week, and which included the charted

(Testimony of W. Lyle Borst.)

information for that week. They are consecutive.

I don't think that we have all of them here, but the major ones are here.

Q. (Mr. Watts, continuing:) Is Exhibit No. 64, which has also been handed you, one of those?

(Whereupon document referred to was marked Plaintiff's Exhibit 64, for purposes of identification.)

A. Yes, sir.

Mr. Watts: We now offer in evidence Exhibits No. 53 to 64, inclusive.

The Court: Is there any objection?

Mr. Scholz: No objection.

The Court: They may be admitted.

Q. (Mr. Watts, continuing:) Generally, Mr. Borst, with respect to Exhibit No. 52, what do they show—I will include all of those exhibits from 52 to 64—what do they show?

A. The progress as gained each week. [130]

Q. What was done from week to week with respect to the heads of the various organizations concerning the progress of the job?

Mr. Scholz: We object to that. It is very vague.

Q. Will you state whether or not weekly progress meetings were held? A. Yes.

Q. And was Mr. Wedlick, representative of the Cory-Joslin people, present at these meetings while he was there? A. Yes, sir.

Q. And who took his place as project manager?

A. Mr. Vasicek.

(Testimony of W. Lyle Borst.)

Q. Did he attend these weekly progress meetings? A. Yes.

Q. Will you tell the Court whether or not while Mr. Wedlick was there, whether he ever made any complaint at any time against you, or any of your organization, with respect to the manner in which you maintained your schedule?

A. No, sir; he did not.

Q. Did Mr. Vasicek make any complaint as to the manner in which you were following your schedule? A. No, sir.

Q. Did you get any complaint from the A-E-M with respect to delaying the progress on this job?

A. No, sir.

Q. Did you have any complaint, or ever get a complaint, from the contracting officers of the United States Government that you were delaying this job? A. No, sir.

Q. Have you had any complaints from Joslin about not upholding your schedule?

A. No, sir.

Q. What did Mr. Wedlick say about holding you to a strict performance of your schedule?

Mr. Scholz: Is that in writing?

Mr. Watts: I asked what he said.

A. Mr. Wedlick said that he would expect us naturally to keep up with the progress of the work. If we did, everything would be all right and everyone would be happy, and if we didn't, he would tell us in no uncertain terms, which he would be expected to do.

(Testimony of W. Lyle Borst.)

Q. Will you tell the Court whether in your opinion this construction schedule is reasonable, taking into consideration all of the factors that existed there at that time?

A. Yes; that was a well thought through schedule in its final form, and it was reasonable.

Q. Was it approved by the Government?

A. Yes, sir. [132]

Q. And by the A-E-M? A. Yes, sir.

Q. And was it approved by Cory-Joslin?

A. Yes, sir.

Q. Now, I want you to tell something about the delays in the performance that you experienced; first, to show the relation of the boilers to each other, I hand you Exhibit No. 47, 47-A, will you identify this for the record?

(Whereupon document referred to was marked Plaintiff's Exhibit 47-A, for purposes of identification.)

A. Yes, sir. That is one of the Hercules Power Company's drawings showing the plan.

Q. I wish you would spread that out and briefly describe the location of the three boilers upon which your organization did its work.

Mr. Watts: I offer it in evidence at this time.

A. This would indicate an architectural drawing of the building. It is some 159 by 104 feet. This view shows the building in which we were working. It is 159 by 104 feet, in which are located three boilers, or three boiler units, designated one, two

(Testimony of W. Lyle Borst.)

and three. That represents the approximate size, or the size in comparison with the building.

Mr. Scholz: That is a reasonable picture of what it represents? [133]

A. Yes, sir.

Q. It is approved by all of the parties?

A. Yes.

Q. I show you now Exhibit No. 47-B, will you tell the Court what that is, please?

(Whereupon document referred to was marked Plaintiff's Exhibit 47-B for purposes of identification.)

A. This shows a view looking at the boilers from inside. It shows two of them. In fact, this boiler is boiler No. 3. Here is the center line (indicating). The approximate height is about sixty feet, and here the building is about sixty-five feet, comparable to a four or five story building.

Mr. Gibson: Is the elevation shown?

A. Yes.

Mr. Watts: We offer Exhibits 47-A and 47-B in evidence.

The Court: Is there any objection?

Mr. Scholz: No objection.

The Court: They may be admitted.

(Whereupon Plaintiff's Exhibits 47-A and 47-B, so marked for identification, were admitted in evidence.)

Q. (Mr. Watts, continuing:) Now, Mr. Borst, I wish you would step down here to this exhibit

(Testimony of W. Lyle Borst.)

which is marked Exhibit No. 48, and tell the Court what this exhibit is. [134]

(Whereupon document referred to was marked Plaintiff's Exhibit 48, for purposes of identification.)

A. This is a picture of a steam generating unit, or a boiler unit, of the general type and character that we are dealing with. It is not a drawing of the exact job, this being a war job, these are not available. This is retouched, so that one can see how it looks. It is retouched by a commercial artist.

Q. (Mr. Watts, continuing:) And—

Mr. Watts: I will offer this.

Q. The purpose of bringing it here is what, Mr. Borst?

A. To show the general character of the material we were dealing with, the drums, the tubes, and the headers.

Q. Will you point out the parts that are involved in this litigation—the water-wall tubes and the headers, so that when we refer to them in the testimony the Court will have a clear understanding of what you mean?

A. To begin with, this machine is a boiler to make steam. This is a unit in which the steam is generated inside a series of tubes, and released into a drum at the top of the unit. There is also a drum at the lower section. The drums are connected with tubes from the lower drum to the top drum, and

(Testimony of W. Lyle Borst.)

form a passageway so that the water that forms **the steam is always inside** of the tubes.

Q. Are these furnace tubes (indicating)?

A. In addition to that, we have an area which is nothing more than the space where the flame is introduced by two burners. I think there were four burners. Fuel is introduced, and there is, as I said, the space where the flame is introduced. The sides of this chamber, or furnace, are composed of tubes carrying water into the drums, so that the entire surface of the side is protected in that the heat built up is transferred to a water-wall surface. We do have the area of water-walls designated as the side water-walls and the roof water-wall. This unit here (indicating) is the structural support for the same, to carry the entire structure here (indicating.) After the tubes and drums and headers are in place,—the headers are a method, or unit, to allow, or for allowing the tubes to terminate,—headers in which the tubes will terminate at the top and bottom. On the outside we find a casing which is a steel packet. Between that casing and the tubes is a system of refractory material which is a fire-resistant clay insulation material, so that the heat, even though a major portion of it is confined to the sides of the water-wall, this is protected so that the outside steel casing,—in this case we have transite, and it remains cool to the touch of the hand.

Q. Will you point out where you find the side

(Testimony of W. Lyle Borst.)

water-wall tubes, the back water-wall tubes, and the front water-wall tubes, the roof tubes, the roof header? [136]

A. Here, here and here (indicating).

Q. Do you have any other tubes that are not apparent?

A. I think that encompasses the basic tubes, other than the boiler tubes. The water-wall device is something that has been developed recently. There is a boiler made that consists of drums with a series of tubes in between for the purpose of generating heat, and then the idea came to put the water-wall on the outside of the furnace and keep the heat in the jacket of the walls.

Q. Will you tell the Court whether there is any well-recognized plan of procedure under which you erect one of these boilers?

A. Yes, sir. It is common practice that certain moves be made at certain times, or at particular times.

Q. There are about eight principal steps that must be taken in the erection of these units: is that right?

A. Yes, sir.

Q. Will you tell the Court these steps, and the order of taking them?

A. Well, the first is the structural steel supports. They are set in place, and then the major boiler drums would be placed.

Q. Indicating by step one, step two, and so forth.

A. Step one would be the structural steel; step two would [137] be the getting of the drums in

(Testimony of W. Lyle Borst.)

their locations, and then would be the erection of the water-walls, headers, and then the starting of the fourth step would be the installation of the tubes in the boilers and the tubes in the water-walls, and then would come the hydrostatic tests after all the tubes were completely in place, the boiler filled with water and pressure pumps installed to see that the water would not leak out. After that would come the brick work, step six, and the jacket is step seven, and step eight comprises the additional work such as putting in the internal exhaust of the drum, the gauge connections, the combustion control and instruments, and all of the appurtenances.

Q. Now, Mr. Borst, normally in that sequence of installation where does the installation of the water-wall tubes come?

A. About the third and fourth steps.

Mr. Watts: Now, we offer in evidence Exhibit, which I think is 49, instead of 48, as I have indicated before.

Mr. Scholz: That is for the purpose of illustration only?

Mr. Watts: Yes.

The Court: It may be admitted for that purpose.

(Whereupon Plaintiff's Exhibit No. 49, so marked for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): I hand you Exhibit No. 48 [138] and I will ask you to identify that for the record.

(Testimony of W. Lyle Borst.)

(Whereupon document referred to was marked Plaintiff's Exhibit No. 48 for purposes of identification.)

A. This is a picture in general of a power plant of the character that we were dealing with.

Q. Is it possible to obtain a picture of this power house?

A. No, sir; this is a Government project in an effort,—a war effort, and it was impossible to get a picture.

Mr. Watts: We offer in evidence now Exhibit No. 48 as a matter of illustrating the kind of power house in which these units were constructed.

Mr. Scholz: According to what Mr. Joslin tells me it is not a very representative picture, but if it helps the Court as being illustrative, we have no objection.

The Court: We will admit it for what it is worth.

(Whereupon Plaintiff's Exhibit 48, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): Now, Mr. Borst, what are the advantages in the performance of boiler erection such as this contract was, in following these eight steps in sequence that you have outlined?

A. Well, it would be that the material is put in place in the most economical way, and also that it would make certain that it would give you the most correct results in the final [138-A] assembly.

Q. What is the effect of following this normal

(Testimony of W. Lyle Borst.)

sequence and of following a sequence not in the manner in which you have testified, so far as economy is concerned?

A. It would be more difficult to install, and it would be more costly to take some other approach.

Q. Tell the Court the effect of following this sequence in some,—as compared to other sequence in regard to the element of time?

A. It would take longer.

Q. You mean it would take longer to follow some other sequence? A. Yes.

Q. Will you state whether or not the procedure that you have outlined is in accordance with good engineering procedure?

A. Yes, sir; I would say it is entirely common to the industry.

Q. Will you state whether or not the specifications which you followed reasonably contemplated that in the erection of these three units you would follow this procedure about which you have testified?

Mr. Scholz: The specifications call for the method of erection, and this would be his conclusion.

The Court: He may answer. [138-B]

A. That would be the normal interpretation of the specifications.

Q. Tell the Court whether in preparing your bid on this contract and estimating the time and cost of this job you took into consideration this normal sequence of erection?

(Testimony of W. Lyle Borst.)

Mr. Scholz: We cannot be bound by this, what he had in mind. It was up to them, of course, to use their own judgment, and make their own choice. If he can come in and say, "I had in mind this or that," and it would be binding on this defendant, I cannot understand it. I think it would be immaterial.

The Court: I think that is right, but I will permit him to answer.

A. In making up the estimate of the cost which formed the basis of our bid, we inspected and analyzed the plans and the work to be done in the normal procedure and manner.

Q. Will you state whether or not by following this procedure you can hold to a minimum the expenses of moving men and equipment from one operation to another? A. That is true.

Q. What is the effect on crews of men that erect these units when the normal sequence of procedure is followed in construction with respect to waiting, or rather, in respect to moving from one job to another without waiting?

Mr. Scholz: We object to that on the grounds heretofore [138-C] stated.

The Court: He may answer.

A. This procedure would enable your crew to move from one phase of the work to another in an orderly manner.

Q. Tell the Court whether or not when you received notice to proceed on July 13th you were

(Testimony of W. Lyle Borst.)

ready to proceed according to this established plan of procedure? A. Yes, sir.

Q. State whether or not, in your opinion, with the organization you had, whether or not you could have completed this job if you had been permitted to follow the normal sequence of procedure and had all the essential and critical parts of these units on hand, and ready for installation, in accordance with the schedule that was agreed upon with the defendant?

A. We could have completed them on schedule.

Q. In how many days?

A. One hundred twenty days.

Q. Tell the Court whether or not this sequence that you have described was followed in the erection of these three units at the Sunflower Plant.

A. No; we were interrupted.

Q. Tell the Court, or give some example where you reversed the schedule in certain instances.

A. Yes, sir. Normally, we would have worked on all of the [138-D] steam generating pressure power units at one and the same time, fitting in drums and tubes in the boiler and then lining the water-wall headers and the tubes in the water-wall system so that we could have it in proper alignment in the entire system.

Q. That would be what steps?

A. Three and four.

Q. What were you forced to do in this instance?

A. We were forced to deal with the water-wall

(Testimony of W. Lyle Borst.)

tubes and with the headers with only a portion of the tubes there.

Q. So that in the sequence which normally would be steps three and four, where did the installation of the water-wall tubes come in this contract?

A. That would be along about four and five.

Q. Did you keep from week to week as a part of your duties as the project manager, or the head of this project at Sunflower, a report?

A. Yes, sir.

Q. Did you make written reports as a part of your duties? A. Yes, sir.

Q. Were these reports prepared and dictated by you? A. Yes, sir.

Q. In these reports did you make a record of the delays that you had suffered, and the reasons for these delays? [138-E]

Mr. Scholz: Objected to as self-serving.

The Court: He may answer.

A. Yes, sir; we did.

Q. (Mr. Watts, continuing): Do you have those records? A. Yes, sir.

Q. Mr. Borst, turn to the first record of any delays, and I want you to refresh your recollection from that report, and independent of the report tell the Court what delays there were, and give the Court the days and the exact description of the delays that you suffered.

A. On August 2nd it was determined for one thing that [138-F] certain boiler tubes were de-

(Testimony of W. Lyle Borst.)

fective, and the matter was brought to the attention of Mr. D. C. Smith and Mr. Neubauer to report the damaged or defective tubes to Hercules Power Company.

Mr. Scholz: Do I understand you claim damages because the material was defective, or because it was not there?

Mr. Watts: Upon two things: That the material was not there, and in the second place, that defective material was on the job and had to be refabricated before we could proceed.

Mr. Sholz: I thought the contract specified that any defective material would be replaced without cost to the subcontractor, and I think he is not entitled to damage for any defective material.

Q. (Mr. Watts, continuing): Now, Mr. Borst, you may proceed and state the delays you experienced according to your records. Refresh your recollection with your records, and then testify as to the facts.

Mr. Sholz: I think an objection should be noted unless this material which he is looking over was made by himself at the time. [139]

The Court: You may inquire about that.

Mr. Sholz: You have a file in your hand?

A. Yes, sir.

Mr. Sholz: What does that purport to be?

A. These are records in the form of weekly reports that I wrote to the home office.

Mr. Sholz: At the time that they bear date?

A. Yes, sir.

(Testimony of W. Lyle Borst.)

Mr. Sholz: That is all that file is?

A. Yes, sir; it is.

Mr. Sholz: Our objection is withdrawn, if the Court please.

The Court: You may proceed.

Q. (Mr. Watts, continuing): The last date to which you testified was August 2nd. Now, you may proceed, Mr. Borst.

A. Well, on August 22nd, Boiler No. 1,—the rolling of boiler tubes was proceeding. The water-wall tubes were received on the 17th of August, and the work of installing these tubes was carried on. The previous work caused some difficulty because of misalignment of the water-wall headers, and we found that if all of the tubes had been on the job at the start this trouble would not have occurred. This matter was reported to the inspector and written into his records. That was Cory-Joslin's inspector. I have a notation that the progress of the [140] work was shown to be about twenty per cent complete at that time.

Mr. Sholz: (Interposing) Apparently this witness is reading from some record.

The Court: Of course, any time that counsel feels that they should be in evidence, I will permit them to be introduced. If there are records, there could be no better evidence.

Mr. Sholz: I think they are self-serving. However, he does have a right to testify as to the delays he alleges he suffered. Whether they can be reimbursed, is another question.

(Testimony of W. Lyle Borst.)

The Court: You may go ahead.

A. On the 13th of September, Boiler No. 1,—the boiler drums and tubes, water-walls were all to have been completed on the 23rd, I believe, and the actual completion date was on the 8th of September. We were short some fifty-seven tubes on this work. The water-wall tubes were requisitioned for August 1st, and were received, the first ones on August 17th, and on boiler No. 2 we found all of the work at a standstill outside of the work on the soot-hoppers, which was completed on the first. This was held up because of the tubes, and on Boiler No. 3 the work had been slowed down to a pace to permit the completion of the drums and headers, in order to be ready for the tubes when they would arrive on August 17th, as scheduled,—

Q. (Interposing): Will you explain what you mean by [141] slowing down, or pacing the work?

A. Well, rather than do the work in absolutely as short a time as possible, we did draw it out and used a lesser number of men, keeping the work in progress rather than using the same number of men and laying them off, so that on this work we more or less gauged it and paced it rather than go ahead rapidly with the work and then lay the men off. There was a delay due to the final cleaning and inspection. At that time we knew that all of the piping work was ahead of schedule and in very good shape,—

Mr. Scholz (Interposing): Are you now talking about those fifty-seven tubes?

(Testimony of W. Lyle Borst.)

A. No; I believe I made a statement that fifty-seven tubes were short, and that I went onto the piping work on September 24th. I believe it was Boiler No. 2 that we had received the water-wall tubes, and these tubes were being installed, and we were working every possible man on that job.

Q. (Mr. Watts, continuing): Commencing as of what date?

A. Immediately after September 20th,—every man we could work on that operation. On the 10th of October on Boiler No. 2 work was held up on account of an error in the water-wall header for that boiler, because,—The Combustion Engineering [142] Company had sent a man and the material necessary to correct this error. This was an error which required the cutting off of the tubes, and installing a nipple on the end of the tubes to increase the size from three inches to three and a half inches, so as to fit in entering a three and a half inch hole in the header, which was made by error. On Boiler No. 3 the boiler tubes were installed except for fifteen tubes short, and the work was delayed in this operation. On the 24th of October Boiler No. 2, the water-wall tubes had been remodeled by the Combustion Engineering Company's man, and the tubes installed, and the hydrostatic test completed on October 25th.

Q. Previously you have described these boiler tubes and these sidewall tubes, or, rather, side water-wall tubes and so forth. I think you testified that they were manufactured by some steel mill and

(Testimony of W. Lyle Borst.)

sent to the Combustion Engineering Company for further fabrication? A. That is right.

Q. Will you describe just what the Combustion Engineering Company did?

A. They cut the tubes to the required length and bent them to the shape required.

Q. As shown here (indicating)?

A. Yes, sir. In addition to that, the Combustion Engineering Company has a patent where they weld a fin the full length [143] of the tube, one on one side and one on the other, and that sticks out a ways, and adds to the breadth of the tube.

Q. Is that so it is more efficient in absorbing the heat? A. Yes, sir.

Q. Is there any other place in the United States where tubes of this type could be bought by the Hercules or by the A.-E.-M., or by anyone else, other than the Combustion Engineering Company?

A. No, sir; that is the only place.

Q. The only place that tubes could have been obtained for this unit that you were erecting?

A. That is right.

Q. Now, Mr. Borst, please identify Exhibit No. 12.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 12, for purposes of identification.)

A. That is a letter to Cory-Joslin & Macnsons, dated August 17th, 1944, from the Power Service Corporation.

(Testimony of W. Lyle Borst.)

Mr. Watts: I offer Exhibit No. 12 in evidence at this time.

The Court: Is there any objection to the introduction of this?

Mr. Scholz: No, your Honor.

The Court: It may be admitted. [144]

(Whereupon Plaintiff's Exhibit No. 12, so marked for identification, was admitted in evidence.)

Mr. Watts: I call upon the defendant to produce the letter of August 15th, 1944, written by Mr. Hagan to the Power Service Corporation, and this letter I hold in my hand now is dated August 17th, 1944, and is signed by Mr. Borst, addressed to Cory, Joslin & Macnsons, care of Lozier, Broderick & Gordon, and is for the attention of Mr. Jung:

"In Re: Completion of Power House No. 1, Lump Sum Contract No. 5, Material Requisition No. 22," and is as follows:

"Gentlemen:

"We hereby confirm the following list of Combustion Engineering Company's material shortages, which was given to Mr. Newbauer of Hercules on August 11th, 1944, by Mr. Elmer Bennett, erector of the Combustion Engineering Company."

and then follows the list of materials.

I now hand the Clerk an exhibit and ask that it be marked 12-A.

Mr. Gibson: And that is from the files of the defendant?

Mr. Watts: That is right.

(Testimony of W. Lyle Borst.)

Q. (Mr. Watts, continuing): Will you identify Plaintiff's [145] Exhibit No. 12-A.

(Whereupon document referred to was marked Plaintiff's Exhibit 12-A, for purposes of identification.)

A. That is a letter from Lozier, Broderick & Gordon, signed by Mr. J. S. Hagan, and it is addressed to the Power Service Corporation.

Mr. Watts: I will read this. It is addressed to the Power Service Corporation, and the subject is: "Material shortages."

"Gentlemen:

"Receipt is hereby acknowledged of your requisitions numbered 1 to 13, the latter being dated August 11th, 1944. We assume that the above requisitions represent all of the shortages of material required for completion of your contract on Power House No. 1, and that same are the result of a complete inventory made by you in accordance with Paragraph 5-04 (b) of your contract.

"If the above requisitions do not cover all of the shortages, we should be advised at once of any further material requirements so that the progress of the work will not be delayed. In accordance with the above mentioned paragraph of your contract, a complete inventory was to have been prepared immediately upon starting your work so that shortages could be determined.

"Yours very truly, [146]

Wm. F. Lozier, Inc., Broderick & Gordon."

The Court: Is there any objection?

(Testimony of W. Lyle Borst.)

Mr. Scholz: No objection to this exhibit.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 12-A so marked for identification, was admitted in evidence.)

Mr. Watts: There is a copy indicated to the resident engineer of Cory, Joslin & Macnson, to D. C. Smith, to C. H. Murphy, to the Power Service Corporation.

Q. (Mr. Watts, continuing): Now, will you identify Plaintiff's Exhibit No. 13, for the record?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 13, for purposes of identification.)

A. Yes, sir; that is a letter to Cory, Joslin & Macnsons from the Power Service Corporation, dated on August 19th, 1944.

Mr. Watts: We offer in evidence Plaintiff's Exhibit No. 13, and I might suggest to counsel that a copy of each one of these exhibits now can be found at page 113 of my brief; so they can refer to them.

The Court: Is there any objection to this exhibit?

Mr. Sholz: No objection.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 13, so marked for identification, was admitted in evidence.) [147]

(Testimony of W. Lyle Borst.)

Q. (Mr. Watts, continuing): Now, Mr. Borst, please refer to Plaintiff's Exhibit No. 4 and tell the Court the date on which you addressed your first letter about this tube shortage to Lozier, Broderick & Gordon,—I mean, when you first addressed it to Cory, Joslin & Macnsons regarding the tube shortage?

A. The letter was written on July 26th.

Q. That is the letter which has been introduced in evidence here, and is dated July 26th, 1944. I don't believe I read it at the time, and I will read it now.

Mr. Watts: Mr. Borst has identified it as being a letter dated July 26th. It is addressed to Cory, Joslin & Macnsons and is from the Power Service Corporation, W. Lyle Borst, Chief Engineer.

“Gentlemen:

“In connection with our subcontract for complete erection of boilers in Power House No. 1, Sunflower Ordnance Works, Johnson County, Kansas, we wish to advise of a major shortage of materials which will delay the progress of our work beyond our contract schedule.

“This material consists of water-wall tubes for all three of the boilers which we are to erect. In order for us to complete our work in the one hundred twenty day period required, it will be necessary for us to have delivered to the job sufficient tubes for one boiler by August 1st, 1944; sufficient tubes for a second boiler by August 8th, 1944, and

(Testimony of W. Lyle Borst.)

the balance of the tubes for the third boiler by August 15th, 1944.

Very truly yours, [149]

POWER SERVICE
CORPORATION,

W. LYLE BORST,
Chief Engineer."

Q. (Mr. Watts, continuing): Now, will you please identify Exhibit No. 14?

(Whereupon document referred to was marked Plaintiff's Exhibit 14, for purposes of identification.)

A. That is a letter from Cory, Joslin & Macnsons to W. Lyle Borst, dated on the 19th of August, 1944.

Mr. Watts: We offer in evidence Exhibit No. 14, a letter dated August 19th, 1944, written by Mr. Jung of the Cory-Joslin people, and addressed to W. Lyle Borst. It is as follows:

"I have received your memorandum dated August 18th, advising me of the conditions encountered in installing the water-wall tubes.

"May I suggest that you go on record with a letter stating these facts, addressed to Cory, Joslin & Macnsons, and one copy addressed to Lozier, Broderick & Gordon, attention of Mr. J. S. Hagan,

(Testimony of W. Lyle Borst.)

Chief Engineer, and one copy to the office of the resident engineer, attention of Mr. Ralph H. Downing.

“CORY, JOSLIN & MACNSONS
RALPH J. JUNG.”

There is a copy indicated to Mr. Wedlick.

Q. (Mr. Watts, continuing): Did you comply with this request of the Cory-Joslin people?

A. Yes, sir.

The Court: If this was offered, is there any objection to the admission of it?

Mr. Watts: It was offered.

Mr. Scholz: No objection.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 14, so marked for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): I will now ask you to identify Exhibit No. 17.

(Whereupon document referred to was marked Plaintiff's Exhibit 17, for purposes of identification.)

A. That is a letter dated August 29th, 1944, to Cory, Joslin & Macnsons from the Power Service Corporation.

Q. What was the purpose of this letter?

A. To advise them of the defects encountered with respect to the water-wall tubes.

Q. And was that in compliance with Mr. Jung's request? A. Yes, in direct compliance.

(Testimony of W. Lyle Borst.)

Mr. Watts: The letter is from Mr. Borst, and is as follows:

“Gentlemen: [151]

“In accordance with your letter of August 19th in which you request that we formally submit the information contained in our memorandum of August 18th with reference to the progress of our work. The contents of this memorandum is as follows:

Memorandum to Mr. Ralph J. Jung August 18, 1944

Memorandum to Mr. Clyde G. McFadden, Sunflower Ord. Works.

“For your information relative to the progress of our work on Power House No. 1, we wish to advise you of the following conditions encountered. As of this date, and yesterday, we are being delayed on the erection of water-wall tubes on Boiler No. 1. This delay is occasioned by the fact that we endeavored to install every tube possible before the main shipment of tubes arrived on August 16th. Due to the fact that we did not have all of the tubes when work on these walls was started. On August 4th. We were unable to install the necessary tack tubes to obtain proper alignment of the headers as the side-wall tubes and roof tubes were not on the job, as you know. We are now delayed in adjusting for this misalignment with respect to the headers to each other. With respect to the boiler supporting steel and side wall casing steel, and with respect to the boiler proper. [152]

(Testimony of W. Lyle Borst.)

“We are waiting for water-wall tubes for No. 2 boiler at this time, and will be unable to proceed with proper setting of headers on this boiler for fear of encountering similar difficulties as experienced on No. 1 boiler. We find that the right front boiler column leans seven-sixteenths of an inch out at the top, and the lefthand front columns leans three-sixteenths of an inch out at the top. To compensate for these variations in dimensions, we shall require all the tubes for Boiler No. 2 in order to proceed.

“We will be glad to review this matter in detail with you, if you desire.

Yours very truly,

PUBLIC SERVICE
CORPORATION,

W. LYLE BORST.”

The Court: What was the date of that letter?

Mr. Watts: August 29.

Q. (Mr. Watts, continuing): Now, will you identify the document marked Plaintiff's Exhibit No. 17-A?

(Whereupon document referred to was marked Plaintiff's Exhibit 17-A for purposes of identification.)

A. That is a diagram that I have prepared.

Q. Will you take that diagram and explain to the Court what you mean by misalignment to which

(Testimony of W. Lyle Borst.)

you referred in Exhibit No. 17, which was the letter dated August 29th? [153]

A. This is a theoretical diagram showing the diagram of a water-wall system wherein there would be a top and bottom header, with tubes carrying between. The tube head is supported on bolts which have adjustable nuts, which allow the header to be lowered or raised, and which are required in the final installation in putting in a system of this kind. It would be good practice to install the tube at one end and then at the other end to obtain the relationship which should follow between the top and bottom header, and that would take care of any particular difference in dimensions between the ends of the two headers and establish that dimension, and all the intervening would then be installed, and the entire system would be in final adjusted alignment.

Q. What was actually done in this case instead of following the procedure that you have outlined?

A. We had only one or two tubes for this system, which we installed at the ends of the headers, but we were unable to obtain the proper alignment of the headers; however, we did go forward with that much work, thinking that we were gaining ground.

Q. When the balance of the tubes came, tell the Court what situation you found to exist?

A. We found that we had made an error in establishing the alignment of the headers. It was unavoidable, and to correct it, [154] we had to go

(Testimony of W. Lyle Borst.)

back and readjust, and when the tubes were all there, and this took longer than if we had not attempted to do the work.

Q. Did you have to tear out some of the tubes and reinstall them and make the entire header level?

A. In effect, yes, but these tubes were not actually made fast, but a considerable number of points of adjustment between various parts of this system with respect to the boiler steel work and so forth had to be taken care of. We had to re-do the work we had done before.

Q. The net effect was what, as to the increased labor cost?

A. It did increase the labor cost.

Q. To what extent?

A. Well, we had made adjustments in position and alignment of the header to as good a position as we could, and then we had to re-do that again after the tubes were all there.

Q. Is that what you referred to day before yesterday when you referred to doing the work out of sequence?

A. Yes, sir.

Mr. Sholz: May I question the witness?

The Court: Yes; you may.

Mr. Sholz: Were you not paid for any changes that you made?

A. Not work of this kind.

Mr. Watts: We offer in evidence Exhibit No. 17-A.

The Court: Is there any objection?

(Testimony of W. Lyle Borst.)

Mr. Sholz: It is only for illustration, I understand?

Mr. Watts: That is right.

The Court: It may be admitted for that purpose.

(Whereupon Plaintiff's Exhibit 17-A for identification was admitted in evidence.)

Q. (Mr. Watts, continuing): The first letter, or notification of delay, was in July?

A. Yes, sir.

Q. Will you please identify Exhibit marked 14-A, Mr. Borst?

(Whereupon document referred to was marked Plaintiff's Exhibit 14-A for purposes of identification.)

A. That is a letter to the Power Service Corporation from Lozier, Broderick & Gordon, signed by Mr. J. S. Hagan. It is dated August 22nd, 1944.

Mr. Watts: We offer in evidence Exhibit No. 14-A, a letter from Mr. Hagen, and it is as follows:

"Attention W. Lyle Borst, Chief Engineer.

"Subject: Defective boiler tubes.

"Gentlemen:

"We have been advised that in the process of cleaning up boiler tubes for Power House No. 1, building No. 154-1, [156] some defective tubes have **been counted**. It is our understanding that the Hercules Powder Company has placed an order for the number of tubes that have been found defective to date, which would cover your present requirements.

(Testimony of W. Lyle Borst.)

“In order that the number of defective tubes that will be required to be replaced in all three **boilers** can be determined, the remaining tubes that have not been examined at this time should be cleaned up at once so that no delay will ensue. Any delay caused by the number of defective tubes not being determined must be absorbed by the Power Service Corporation.

Yours very truly,

WILLIAM F. LOZIER, INC.,
BRODERICK & GORDON.”

There is a carbon copy indicated to Mr. Wheelock, Resident Engineer, to Mr. F. V. Wedlick, Mr. Neubauer, and of course this letter to the Power Service Corporation.

Q. (Mr. Watts, continuing): Will you identify plaintiff's Exhibit 15, which has been marked.

(Whereupon document referred to was marked Plaintiff's Exhibit 15, for purposes of identification.)

A. That is a letter dated August 22nd, 1944, addressed to Cory, Joslin & Macnsons by the Power Service Corporation, signed by myself. [157]

Mr. Watts: We offer in evidence Plaintiff's Exhibit No. 15, and I will read it:

“Gentlemen:

“We have found that the water-wall headers for the front wall on Boiler No. 2 to have more holes

(Testimony of W. Lyle Borst.)

than they should have. These headers we will not be able to use.

“These headers were erected in approximate location before we came on the job. We would propose to remove these headers and install two headers from Boiler No. 3 so as to enable us to do as much work on No. 2 Boiler as we can. The cost of removing these headers and the installation of headers from No. 3 boiler we feel should be paid for over and above our contract. The time required should also be granted as an extension to our contract. We have also made formal requisition for the new headers to be used on Boiler No. 3.

“Will you kindly review this matter as soon as possible.

Very truly yours.

POWER SERVICE
CORPORATION,

W. LYLE BORST.”

Q. (Mr. Watts, continuing): Will you explain what you mean by header having too many holes in it?

A. Well, it has a system of holes which receive the tubes. The tubes enter into, and fasten to it. Naturally it is manufactured [158] for a specific boiler. In this case this header had been fabricated in error, or for some other unit, and had been shipped out in error, and could not be used, and could not be rebuilt.

(Testimony of W. Lyle Borst.)

Q. Had it been installed in the unit?

A. Yes, it had been hung in the approximate location.

Q. Will you tell the Court when in the usual course of procedure you would be expected to learn that it had too many or too few holes? At what period, or place, in your work?

A. When you get into a job and are dealing with it, you then start to put the tubes in place. Obviously, if the holes were incorrect, it would be visible at that time.

Q. How many holes would these headers have, approximately, running across here (indicating)?

A. Roughly, thirty-five.

Q. You were paid for this additional work?

A. Yes; we were.

Q. Under the modification, or one of the modifications introduced yesterday?

A. Yes, for taking down this header, loading it out, and putting in another.

Q. Before this modification did you get a letter about an extension of time?

A. Yes, sir; we did. [159]

Q. I will ask you to identify Exhibit No. 15-A.

(Whereupon document referred to was marked Plaintiff's Exhibit A, for purposes of identification.)

A. That is a letter to Cory, Joslin & Macnsons from Mr. Hagan, dated August 29th, 1944.

Mr. Scholz: As I understand it, Mr. Borst has testified that he has paid for that work. That tes-

(Testimony of W. Lyle Borst.)

timony was offered for the purpose of showing damage, was it? I move the testimony regarding that be stricken from the record.

The Court: I think it would be material, not as to proving damages for that work, but it would show that in the entire contract there was additional work, and a portion of it was paid for. Your objection is overruled.

Mr. Watts: This letter is signed by Mr. Hagan, and dated August 29th, 1944.

"Subject: Water-wall headers, Power House No. 1.

"We are in receipt of a copy of letter from the Power Service Corporation addressed to you, under date of August 22nd, in which they call your attention to the fact that the water-wall headers for the front wall on Boiler No. 2 have more holes in same than they should have, and that they will be unable to use same.

"It is our understanding that these headers were erected prior to the Power Service Corporation's work [160] on the job. The Hercules Powder Company has issued Work Order No. X-5333 covering the removal and replacement of the defective headers, and the cost of same in the amount of \$114.43 is to be charged back to the Ordnance Department on the above Work Order. The Hercules Powder Company, in turn, will charge back to the Combustion Engineering Company, who is responsible for the defective headers. The Combustion Engineering Company's representative, Mr. Bennett, has

(Testimony of W. Lyle Borst.)

agreed with the Power Service Corporation on the above amount. We will pay the Power Service Corporation the additional amount of \$114.42 on its contract to cover this work.

“We believe that the work is of such a nature that no additional time should be granted for executing same, as the Power Service Corporation has used the headers originally scheduled for Boiler No. 3 on Boiler No. 2, and the new headers, when supplied by the Combusion Engineering Company will be used on Boiler No. 3.

J. S. HAGAN,
Chief Engineer.”

There was a carbon copy sent to C. H. Murphy and L. J. Neubauer. We now offer Exhibit 15-A in evidence.

The Court: Is there any objection?

Mr. Scholz: None.

The Court: It may be admitted. [161]

(Whereupon Plaintiff's Exhibit 15-A for identification was admitted in evidence.)

Mr. Watts: I also offer No. 15 in evidence.

The Court: If it was not admitted before it may be shown now in the record as being admitted.

(Whereupon Plaintiff's Exhibit 15, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): Will you please identify Plaintiff's Exhibit No. 22, marked for identification.

(Testimony of W. Lyle Borst.)

(Whereupon document referred to was marked Plaintiff's Exhibit No. 22, for purposes of identification.)

A. It is a letter dated September 27th, 1944, addressed to Cory, Joslin & Macnsons, signed by myself, W. Lyle Borst.

Mr. Watts: We offer Exhibit No. 22 in evidence, and I will read it. It is for the attention of Mr. Wedlick:

"RE: Completion of Power House No. 1, Lump Sum Sub-contract No. 5.

"Gentlemen:

"We wish to advise that there is an error in the fabrication of the two lower side wall water-wall headers as furnished for Boiler No. 2 by Combustion Engineering Company. These headers have been drilled with three and one-half inch holes instead of three inch holes, as required to suit the three inch tubes. [162]

"The matter has been reviewed by the Combustion Engineering Company, and we have been advised verbally that they will take steps to make correction to cure the error. The method which Combustion Engineering Company states they will use will be to provide new short tube sections to weld on the ends of the three inch tubes to increase the diameter up to three and a half inches. This tube could then be rolled into the header, having the three and one-half inch hole. Combustion Engineering Company will send a man to the site to weld on these new tube ends.

(Testimony of W. Lyle Borst.)

“As we were prepared to install these tubes as of September 26, we will experience a delay on this Boiler until these tubes have been made over and ready for installation.

“Combustion Engineering Company say that they will have material and men on the job in about one week to do this work.

“Yours very truly,

POWER SERVICE
CORPORATION,

W. LYLE BORST.”

There was a copy of that letter sent to Lozier, Broderick & Gordon and to Mr. R. H. Downing.

Q. (Mr. Watts, continuing): Will you step down here, Mr. [163] Borst, and describe that error to the Court?

The Court: Have you offered the last exhibit in evidence?

Mr. Watts: I believe I did. If not, I now make the offer.

The Court: Any objection?

Mr. Scholz: No.

The Court: Admitted.

(Whereupon Plaintiff's Exhibit No. 22 for identification was admitted in evidence.)

A. In case of this boiler we would have this situation: This header was found to have holes larger than they should have been to receive the three inch tubes.

(Testimony of W. Lyle Borst.)

Q. What are the size of those tubes?

A. Three inches on the outside diameter.

Q. What is the size of the holes in the header, the correct size?

A. Three and sixteen-hundredths, probably,—just enough to allow the tubes to slide in.

Q. And what size were the holes?

A. Three and one-half inch.

Q. And was it possible to roll the tubes under those conditions? A. No, sir. It was not.

Q. And what was done, Mr. Borst?

A. It was elected to have the tube cut off about a foot away from the end and get a new section welded on, and instead of the portion that was cut away, in place of it, rather, there was a piece that was increased from three inches on one end to three and one-half inches on the other end. This brings it to three and one-half inches on the end we wished to bring into the header.

Q. Was that process followed rather than wait for new tubes? A. Yes, sir.

Q. Did that situation produce any delay in the performance of the contract? A. Yes, sir.

Q. Will you identify, for the record, Exhibit No. 22-A?

(Whereupon document referred to was marked Plaintiff's Exhibit 22-A for purposes of identification.)

A. That is a copy of a telegram from the Combustion Engineering Company. I don't find any date on it. The date does not show.

(Testimony of W. Lyle Borst.)

Mr. Watts: We offer Exhibit 22-A in evidence.

Mr. Scholz: Who is that from?

A. I think from the Combustion Engineering Company, manufacturer of tubes and boilers. [165]

Mr. Scholz: Do you know that, or is it your belief? A. I know. I have seen it.

Mr. Watts: I offer this in evidence.

Mr. Scholz: We object to it as immaterial. I think it just clouds the record, and it is not binding on this defendant.

The Court: I will consider your objection, but I will permit it in the record at this time. I will strike it later if I decide it is immaterial.

(Whereupon Plaintiff's Exhibit 22-A for identification was admitted in evidence.)

Q. (Mr. Watts, continuing): Does this have to do with the [166] matter you have been testifying about? A. Yes, sir; that is right.

Q. Will you identify Exhibit marked 22-B, please?

(Whereupon document referred to was marked Plaintiff's Exhibit 22-B, for purposes of identification.)

A. That is a letter from Mr. J. S. Hagan, Chief Engineer, to Cory, Joslin & Macnsons, for Mr. Wedlick. It is dated September 28th, 1944.

Mr. Watts: We offer Exhibit No. 22-B in evidence and I will read it at this time. It is ad-

(Testimony of W. Lyle Borst.)

dressed to Cory, Joslin, for the attention of Mr. Wedlick:

“Subject: Completion of Power House No. 1, Building No. 154-1, Lump Sum Subcontract No. 5 to Fixed Fee Subcontract No. 5.

“We are in receipt of a copy of letter under date September 27th from the Power Service Corporation, addressed to Cory, Joslin & Macnsons, in which they advised that they will experience a delay in the completion of Boiler No. 2 due to the error in the fabrication of the two lower side wall water-wall headers as furnished by the Combustion Engineering Company. It would appear from the letter that it was written to justify a future claim for an extension of time.

“From information that we have received from our [167] Mr. Neubauer, it would appear that one day's delay has been suffered by the Power Service Corporation. This was on September 26, when the error was discovered by them. We were not notified until September 27 as to how the Combustion Engineering Company had decided to rectify the error. At this time part of the tubes had been rolled into the header, and this operation can proceed on all the tubes except the nine tubes in each header where the error exists.

“The water-wall headers for Boiler No. 3 were unloaded this morning (September 28), so that the Power Service Corporation may proceed in erecting tubes on Boiler No. 3, should there be some delay in receiving the nipples required for them to

(Testimony of W. Lyle Borst.)

place the nine tubes in each of the two headers in Boiler No. 2.

(Signed) "J. S. HAGAN."

There is a carbon copy of this letter sent to C. H. Murphy, L. J. Neubauer, and also to the Power Service Corporation. If I have not already done so, I offer this in evidence at this time.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 22-B, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): Now, will you identify No. 23 for the record? [168]

(Whereupon document referred to was marked Plaintiff's Exhibit No. 23, for purposes of identification.)

A. It is a letter from the Power Service Corporation signed by me to Cory, Joslin & Macnsons, Sunflower Ordnance Works. It is dated October 10th.

Mr. Watts: I offer Exhibit No. 23 which is a letter addressed to Cory, Joslin & Macnsons from the Power Service Corporation, and it is as follows:

"Attention: Mr. Frank Wedlick.

"RE: Completion of Power House No. 1, Lump Sum Subcontract No. 5.

"Gentlemen:

"We wish to make certain that you understand the status of our work on Boiler No. 2, which is

(Testimony of W. Lyle Borst.)

delayed because of the error in water-wall headers. All work on the boiler water-walls and boiler tubes was completed as far as possible on September 30, 1944.

“No further work on the boiler proper can be done until the 18 water wall tubes have been installed. This cannot be done until the three and one-half inch to three inch swedge ends have been received and welded on by Combustion Engineering Company.

“We will, of course, be unable to do any major work on the setting until the hydrostatic test has been made on [169] this boiler.

“We are also waiting delivery of the balance of boiler tubes on No. 3 boiler.

Yours very truly,

POWER SERVICE
CORPORATION,

By W. LYLE BORST.”

There is an indication that copy was sent to Lozier, Broderick & Gordon, and to Mr. R. H. Downing, Resident Engineer.

Q. (Mr. Watts, continuing): That letter was written on October 10th? A. Yes.

Q. What was the date that you specified and agreed upon that the tubes on Boiler No. 3 should be delivered?

Mr. Scholz: The best evidence is the writing itself.

(Testimony of W. Lyle Borst.)

Mr. Watts: I introduced it yesterday. I called your attention to that.

The Court: Yes; that is right, and that was exhibit what?

Mr. Watts: That was 51, and showed that these were due on August 15th. A copy of that letter of October 10th was sent to William F. Lozier, Broderick & Gordon, and to Mr. Downing. The one to Broderick & Gordon was for the attention of Mr. J. S. Hagan. [170]

The Court: Do you have any objection to this last exhibit?

Mr. Scholz: No.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 23 so marked for identification was admitted in evidence.)

Q. (Mr. Watts, continuing): Will you now identify Exhibit marked Plaintiff's Exhibit No. 24 for the record, Mr. Borst?

(Whereupon document referred to was marked Plaintiff's Exhibit 24 for purposes of identification.)

A. That is a letter from the Power Service Corporation to Cory, Joslin & Macnsons.

Mr. Watts: We offer exhibit No. 24. It is a letter dated October 14th, 1944, signed by Mr. Borst, and addressed to Cory, Joslin, for the attention,—addressed to Cory, Joslin, Desoto, Kansas, for the attention of Mr. Wedlick, and the subject is:

(Testimony of W. Lyle Borst.)

“Completion of Power House No. 1 Lump Sum Subcontract No. 5.”

and is as follows:

“Gentlemen:

“We wish to advise that we have today received the swadged reducers for the water-wall on No. 2 boiler. There were no chill rings received with these [171] reducers, so that we will not be able to go forward with the work of revamping the water-wall tubes. Mr. Bennett of Combustion Engineering Company has reported this shortage to his Chicago office with a view of having them sent out by air express.

“Yours truly,

POWER SERVICE
CORPORATION,

By W. LYLE BORST.”

and there is a copy of that letter to William S. Lozier, Broderick & Gordon, for the attention of Mr. Hagen, and a copy to the resident engineer, attention Mr. R. H. Downing. We offer the exhibit at this time.

The Court: Any objection?

Mr. Scholz: No.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 24, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): Will you identify Exhibit No. 25,—Plaintiff's No. 25, for the record?

(Testimony of W. Lyle Borst.)

(Whereupon document referred to was marked Plaintiff's Exhibit No. 25, for purposes of identification.)

A. That is a letter dated November 10th, addressed to Cory, Joslin & Macnsons from the Power Service Corporation.

Q. What is the significance of November 10th?

A. That was the end of the one hundred twenty day [172] period.

Mr. Watts: This is a letter, as the witness said, addressed to Cory, Joslin & Macnsons, dated November 10th, for the attention of Mr. F. V. Wedlick. The subject is:

"Completion of Power House No. 1,"
and the letter reads:

"Gentlemen:

"With reference to our contract for completion of Power House No. 1. We wish to advise that we shall be unable to complete our work in the one hundred twenty day period provided for in our contract. This time elapsed on November 10th.

"The delay in our completion is due in part to delay of shipment of water-wall tubes, which were not on the job when we began work. We were also delayed because of water-wall headers which had to be furnished new in view of an error by others in fabrication of the original headers furnished.

"More specifically, these delays may be analyzed as follows. (Reference to required dates. Refer to our original completion schedule.)

(Testimony of W. Lyle Borst.)

“Boiler No. 1:

“Water-wall tubes required August 1st. Water-wall tubes received August 17th. Water-wall tubes 16 days late.

“Boiler No. 2:

“Water-wall tubes required August 8th. Water-wall tubes received September 20th. Water-wall tubes 43 days late.

“Boiler No. 3:

“Water-wall tubes required August 15th. Water-wall tubes received September 20th. Water-wall tubes 36 days late. Water-wall headers required at start of job, August 15th latest. Water-wall headers received September 26th. Water-wall headers 41 days late.

“A delay was also occasioned by the fact that certain other water-wall headers on Boiler No. 2 were fabricated in error and necessitated a modification of the tubes which connect to the header. Work was held up on this boiler from September 30th until October 18th.

“From the above it is apparent that the progress of our work has been delayed through factors beyond our control. We, therefore, request an extension of our contract completion date to December 15th.

“In making this request for additional time of completion we do not waive any rights which we have claimed for additional compensation to such delay. These claims would be accordance with the

(Testimony of W. Lyle Borst.)

paragraph [174] appended to the contract which provides for such claims.

Yours very truly,

POWER SERVICE
CORPORATION,

W. LYLE BORST,
Chief Engineer."

There is a copy of that letter to J. S. Hagan, and also to Mr. R. H. Downing.

The Court: Do you have any objection to this exhibit, Mr. Scholz?

Mr. Scholz: None.

The Court: It may be admitted.

(Whereupon, Plaintiff's Exhibit 25, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing): Mr. Borst, I wish you would take the progress schedules introduced in evidence, and also refresh your recollection from your records, and tell the Court what delays you experienced in the performance of this contract, and demonstrate those delays by reference to your progress schedule as you make your explanation.

Mr. Scholz: Is that Exhibit No. 51 that you referred to? [175]

Mr. Watts: From 51 to 64, inclusive.

A. In summarizing the delays at the time we made it clear,—we noted that the water-wall tubes had been required as of August 1st for Boiler No. 1, which was the date shown on the progress chart,

(Testimony of W. Lyle Borst.)

which is Exhibit No. 51. It was shown the date on which the water-wall tubes would have been required for Boiler No. 1, which was August 1st. In this memoranda we show,——

The Court: What exhibit is that?

Mr. Scholz: That is your interpretation is it not, Mr. Borst?

A. Yes.

Mr. Scholz: Your interpretation of the Progress schedule?

Mr. Gibson: These schedules show, or, rather this schedule shows when they started a certain unit of work, and it shows between certain times that they proposed to do so much work within so many days.

The Court: Does the schedule show anything in addition to that?

A. These exact items, the water-wall tubes for Boiler No. 1, Boiler No. 2 and Boiler No. 3, that is the particular item I am dealing with here,——

Q. (Mr. Watts, interposing): In other words, Mr. Borst, [176] the water-wall tubes could not be installed unless they were on the job?

The Court: This exhibit does not show that. It only shows that the tubes were required on a certain date.

Mr. Gibson: The proposed progress. This shows that they proposed to do a certain job. It doesn't mean that the tubes were there, or were not there.

Mr. Scholz: The schedule shows the number of

(Testimony of W. Lyle Borst.)

days that will be required to do a certain amount of work.

The Court: Is that correct?

A. This schedule shows the number of days in which that was to have been completed.

Mr. Scholz: It shows the number of days that was proposed by you?

A. Yes, sir.

Q. (Mr. Watts, continuing): Was the work commenced? A. Yes, sir.

Mr. Scholz: This is merely your proposed schedule showing that a number of days would be required to do a certain unit of work?

A. Yes, sir.

The Court: That is, according to your judgment?

A. Yes, sir.

Q. (Mr. Watts, continuing): Was this agreed upon by [177] the A.-E.-M., the Government and the defendant?

A. Yes, sir. This was the logical reasonable time needed that was agreed upon.

Q. And what was the date upon which you proposed to commence the installation of the tubes for Boiler No. 1?

A. It shows August 1st as being the date, this is August 1st, this line here (indicating).

Mr. Scholz: These little squares are days?

A. That is right.

The Court: In other words, that is the proposed plan of operation?

(Testimony of W. Lyle Borst.)

Mr. Watts: That is the agreed plan.

The Court: It is a plan of operation?

A. Yes, sir.

Mr. Scholz: As I understand you, you submitted this progress schedule and it shows a number of days to do a certain unit of work. You submitted that to the defendant, and you testified that he approved of this progress schedule?

A. That is right.

Q. (Mr. Watts, continuing): According to this progress schedule, on what date was it necessary to have the water-wall tubes for Boiler No. 1 on the site in order to commence the installation in accordance with the progress schedule agreed upon?

A. For Boiler No. 1, it would be August 1st; for Boiler No. 2, August 8th; for Boiler No. 3, August 15th.

Mr. Scholz: That is, providing you were ready to proceed yourself, and the materials were there?

A. Yes, sir.

Q. (Mr. Watts, continuing): Were you ready to install the tubes on August 1st?

A. Yes, sir.

Q. In Boiler No. 1? A. Yes, sir.

Q. Were you ready to install the tubes on Boiler No. 2 on August 8th? A. Yes, sir.

Q. Were you ready to install the water-wall tubes on Boiler No. 3 on August 15th?

A. Yes, sir.

Q. Were they present on the site and ready for installation,—ready for your company to install?

(Testimony of W. Lyle Borst.)

A. No, sir.

Q. When were the tubes for Boiler No. 1 actually furnished? A. On August 17th.

Q. When were the tubes for Boiler No. 2 actually furnished? [179] A. September 20th.

Q. How many days late were they in furnishing the tubes on Boiler No. 1?

A. Sixteen days.

Mr. Gibson: I think this objection should be made to the statement that they should be there; they are predicated on orders from this plaintiff in order to get these tubes on the site, and there is nothing to show that he made any such until the last of August.

The Court: I have in mind the other exhibits. In other words, the progress chart would show only the thought of the contractor. This would have to be along with other testimony and the terms of the contract. Now, this witness might testify with that in mind.

Q. (Mr. Watts, continuing): When were the tubes due for Boiler No. 3?

A. August 15th.

Q. When were they furnished?

A. September 20th.

Q. How many days late were the tubes for Boiler No. 3 furnished? A. Thirty-six days.

Q. When were the headers required?

A. The headers on Boiler No. 3 were required on the [180] start of the job, or August 15th, at the latest.

(Testimony of W. Lyle Borst.)

Mr. Scholz: You say "required,"—now, this was taken in connection with everything else, the contract and the other evidence?

Mr. Gibson: The question presupposes an order, and there is no testimony of any order given.

The Court: In Exhibit 17, I think,—no, perhaps it was Exhibit 4 there was notice.

Mr. Gibson: There was a letter that there was a shortage of tubes.

The Court: They are placing this in evidence to show the difference in the furnishing of this material, and by that the difference in the construction chart.

Mr. Watts: I have a deposition subsequently to be introduced which will show that these boiler,—the boiler tubes were already on order by the Hercules Company prior to July 10th, prior to the time the contract was awarded. These tubes were all ordered, and he put them on notice that they would require them. They had already been ordered.

The Court: I think I understand both counsel. You may proceed.

Q. (Mr. Watts, continuing): Tell the Court when, according to the progress schedule, the headers must be present in [181] order for you to follow the progress schedule agreed to by the defendants?

A. The headers were to be there on August 15th, and they were received on September 26th, which was forty-one days later.

Q. Now, you may take your seat again. Tell

(Testimony of W. Lyle Borst.)

the Court what type and by whom,—strike that, please, Mr. Reporter. Tell the Court by what type of inspection were you inspected, and by whom, and when, in connection with the erection of these units?

A. Day to day inspection, carried on by Cory, Joslin, and in addition to that the Area Engineer had in his office a progress scheduling engineer who visited the job nearly every day. Mr. Neubauer was on the job continuously as resident engineer, and he inspected them. At the time when the equipment was placed under hydrostatic we had the service of the Hartford Steam Boiler Company, who also inspected.

Q. Tell the Court whether you had any criticism in writing, or verbal, by representatives of the defendant from the beginning to the end of performance with respect to the time when you requisitioned the material? A. No, sir.

Q. Was there ever any criticism, verbal, or in writing, from any representative of the defendants throughout the performance of the contract with respect to your performance [182] so far as delay is concerned? A. No, sir.

Q. Was there any criticism, either verbal or in writing, by any representative of the A.-E.-M., with respect to the time when you requisitioned this material?

A. Mr. Hagan wrote once or twice inquiring about the requisitions.

(Testimony of W. Lyle Borst.)

Q. Have these letters been introduced during the trial? A. Yes, sir; I think so.

Q. Was there ever any other criticism other than those letters with respect to the time these requisitions were made? A. No, sir.

Q. Has there ever been any criticism, either verbal or in writing, with respect to the delay in the performance of your contract?

A. No, sir.

Q. Has there ever been any criticism, either verbal or in writing, to you, or your company from the Contracting Officer about the time you requisitioned the material? A. No, sir.

Q. Has there ever been any criticism, either verbal or in writing, with respect to any delays in the performance by your organization? [183]

A. No, sir.

Q. On the contrary, will you tell the Court what words were used by the Contracting Officer, or his representative, or the defendants' representative, Mr. Wedlick, about your conduct on this job?

A. Mr. Fegels, our president, visited the project and talked to the Area Engineer about the contract. Mr. Matthews told Mr. Fegels that our work was satisfactory. Mr. Hagan told Mr. Fegels that Borst and his work is satisfactory, and Mr. Wedlick told Mr. Fegels that our work was good, that it was satisfactory.

Q. Have you had any complaints, either about the time you requisitioned this material, or about

(Testimony of W. Lyle Borst.)

the performance, since the completion of the contract by a representative of Cory, Joslin, or the A.-E.-M., or any contracting officer?

A. No, sir.

Q. Did you put on as many men as it was possible to use when the material arrived on the site for the purpose of expediting this contract?

A. Yes, sir.

Q. Did you work overtime? A. Yes, sir.

Q. Have you made a computation in the last two days of the overtime that the supervisory personnel worked between [184] November 10th and December 19th?

A. We have established the total cost of the payroll for that period for those men.

Q. How many men were employed as a part of your supervisory personnel between November 10th and December 19th,—how many men?

A. Eleven men.

Q. Will you tell the Court, Mr. Borst, what was the regular weekly wage in totals without any Sunday or overtime for those men for the period from November 10th to December 19th, without any overtime?

A. Without any overtime, on a base week, \$8,267.53.

Q. I said without any overtime?

A. \$4,278.83.

Q. Will you tell the Court what you actually paid these same men, including overtime?

(Testimony of W. Lyle Borst.)

A. \$7,163.83.

Q. In other words, your overtime for that period, the thirty-nine days, almost doubled your normal payroll for these eleven men?

A. That is correct.

Q. Have you made any claim for that additional cost in connection with this claim, so far as the overtime is concerned? A. No.

Mr. Gibson: May I have a notation as to the exhibit, Mr. Watts?

Mr. Watts: It Exhibit No. 65, a copy of which is attached to the brief at page 137, to page 141.

Mr. Gibson: Has it been offered as an exhibit?

Mr. Watts: No, but it will be.

Q. (Mr. Watts, continuing): Will you tell the Court whether or not these delays to which you have testified are or are not reasonable, in your opinion?

A. The delays to which we have testified are accountable by virtue of delays,—

Q. (Interposing): Are they reasonable,—put it this way: Did the defendant furnish the materials here within a reasonable time in accordance with the progress schedules agreed upon?

Mr. Gibson: That is objected to as incompetent, irrelevant and immaterial,—whether the material was furnished within the time specified in the contract, that is the question.

Mr. Watts: The schedule is required by the con-

(Testimony of W. Lyle Borst.)

tract, and I must prove that the delays were unreasonable.

The Court: I don't think it is material to prove or disprove any issue here, but he may answer.

A. The delivery of the material was not made in time [186] reasonable to the progress schedule.

Q. Give me one illustration of what you mean by that, Mr. Borst.

A. Particularly the tubes,—the water-wall tubes which were required for the No. 3 boiler on August 15th.

Q. How many days was that out of the one hundred twenty day period that the tubes were required?

A. That date of August 15th was some thirty-two days after the commencement of the work.

Q. To be perfectly correct, wasn't it thirty-three days?

A. All right, thirty-three days, and then delivery actually was made, I believe, thirty-nine days after that; so that the actual time between the starting of the work and the time we actually got those tubes was the sum of thirty-three plus thirty-nine days.

Q. Which would be a total of how many days?

A. Seventy-two days.

Q. Which would leave you how many days out of the hundred and twenty to complete the contract after you received the tubes?

A. Forty-nine days.

(Testimony of W. Lyle Borst.)

Q. And,—

Mr. Scholz: It is agreed that my objection goes to all the testimony of this kind that is offered and accepted? [187]

The Court: The question of the unreasonableness of this delay would not be material as far as proving the damages. The question would be when he was ready, and how much he was delayed, not when he got the material. I will admit the testimony, however, but with that thought in mind.

Mr. Watts: In my brief, I have cases which hold that I must establish that the delays were unreasonable. If I don't, then I cannot recover, and the only way I can establish it is by testimony.

The Court: The thought I have is that it would not make any difference, unless they were ready to go ahead with the work.

Mr. Gibson: Plus the fact that the delay was a breach by the defendant. The question is whether the remaining forty-nine days was a reasonable time to complete that unit.

A. It was not a reasonable time.

Q. (Mr. Watts, continuing): What was a reasonable time for you to have in which to erect those units? A. About eighty-eight days.

Q. Were you ready, able and willing to proceed with the erection of this unit eighty-eight days before the termination of the contract?

Mr. Scholz: We object to that as calling for a [188] conclusion of the witness.

(Testimony of W. Lyle Borst.)

The Court: He may answer.

A. Yes, sir; we were ready.

Q. (Mr. Watts, continuing): Tell the Court whether or not, if it had not been for those delays, that you were ready, willing and could have completed this contract within the one hundred and twenty day period from the date you commenced?

A. Yes, sir; we were.

Q. The actual date for the completion of the contract was what? A. December 19, 1944.

Q. The date that you were supposed to complete was what, Mr. Borst?

A. November 10th.

Q. Does the date that you completed appear on Exhibit No. 64, the construction schedule?

A. Yes, sir; I think it does.

Q. Point out to the Court the condition of the progress schedule as of December 19th.

A. The date set up had been November 10th as being the desired date, or the one hundred and twenty days. I will repeat this: The curve,—the original curve lettered "A" shows the date for the desired completion by November 10th; [189] the date on which completion was carried out, being curve "B", is December 19th.

Q. Now, Mr. Borst, have you been paid the full contract price as modified?

A. Yes, sir; we have.

Q. I hand you Exhibit No. 46, will you state what it is?

(Testimony of W. Lyle Borst.)

(Whereupon document referred to was marked Plaintiff's Exhibit No. 46, for purposes of identification.)

A. It is a letter from Cory, Joslin to the Power Service Corporation dated March 18th, 1946.

Mr. Watts: We offer Exhibit No. 46 in evidence. It is a receipt dated March 18th, 1946, signed by the Power Service Corporation, directed to Cory, Joslin, and it recites: "Power Service Corporation, 711. Wesley Temple Building, Minneapolis, Minnesota. Final Payment on Subcontract F. F. No. 5 to Government Contract No. W-461-Eng-10274, \$1,000.00.

"Payment in full exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision.

POWER SERVICE CORP.,

/s/ P. C. GAFFNEY,
Treasurer."

and it has the seal of the corporation. [190]

The Court: Is there any objection to that exhibit?

Mr. Scholz: No.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit No. 46, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing:) I want you to tell the Court about the claim for damages that you submitted after the termination of the contract.

(Testimony of W. Lyle Borst.)

What period of time elapsed between the time when the job was completed and the time when the claim for damages was submitted first?

A. Something about sixty days.

Q. Can you give the exact date?

A. The completed date was December 19th, and I think the first claim was on February 24th. That was roughly the date.

Q. Will you tell the Court now in connection with the factors that you took into consideration in preparing this claim—tell the court whether the war was still on. A. It was.

Q. And what type of construction was it possible for companies of your type of company to get, or obtain?

Mr. Scholz: We object to that as immaterial.

Q. Mr. Watts: The explanation of the question is this: [191] Plaintiff originally submitted a claim to the defendant for \$9,323.02. Later that was amended, or changed, to \$10,008.70. At the present time in this action we are asking for \$34,343.00 in damages. I want to demonstrate to the Court exactly what factors entered into the amount of the claim originally submitted, and the factors that enter into the determination of damages according to the law.

Mr. Gibson: The claims speak for themselves. They indicate what are in each one of them.

The Court: I think that is correct. However, I am going to admit this in connection with the

(Testimony of W. Lyle Borst.)

additional claim you filed in this Court, with the understanding that I am admitting it with the receipt and settlement in mind. If the Court later determines that you are bound by the settlement under this receipt, then this testimony would be stricken and not considered by the Court.

Mr. Watts: That is right.

The Court: With the thought in mind, this is my question: Whether you are entitled to make settlement, or, rather after making settlement to make any addition to the claim. I will admit your testimony subject to its being stricken when the Court passes on that question.

Mr. Gibson: And we have an objection that it is [192] incompetent, irrelevant and immaterial, and not within the issues of this case.

The Court: Yes. And it will be understood, also, so that Counsel will not be waiving any rights, that there is a motion to strike made at this time. Is that satisfactory?

Mr. Gibson: Yes, it is, your Honor. And the motion to strike is presumably in the record, and the Court is reserving judgment on it?

The Court: That is right. It gives the Court more time to rule. You may proceed now.

Q. (Mr. Watts, continuing:) The war was on?

A. Yes.

Q. What source was open to your organization for contract work during the period of the war?

A. The contracts primarily were war projects.

(Testimony of W. Lyle Borst.)

Q. Did you during this period have any negotiations—any other contracts with the Government?

A. Yes, sir; we had them in a general way under discussion.

Q. Tell what they were.

Mr. Scholz: I don't understand the purpose of this.

Mr. Watts: The purpose is simply this: I want [193] your Honor to put himself in the position of this plaintiff when they set down to figure the original claim, and unless you know the situation they were surrounded with then, you cannot pass upon whether or not that did constitute a waiver, that is, what they did at that time constituted a waiver.

Mr. Scholz: What they did was in their own mind. We are guided by the claim they did submit. What they discussed cannot be binding upon the defendant in this action. The ultimate fact is they submitted a claim. What they thought would not be binding on this defendant.

The Court: I think you are right, but under the former ruling that all of the testimony will be stricken holds that they cannot go beyond that claim, he may answer.

A. Major Matthews here at the Sunflower had a project in mind that he was inquiring whether he would be interested in bidding on.

Q. The contract involved how much?

A. From two to three hundred thousand dollars.

(Testimony of W. Lyle Borst.)

Q. What other contract were you negotiating for with the Government?

A. A power plant at the Gopher Ordnance at Rosemont, Minnesota.

Q. Did you discuss this with Major Matthews?

A. Yes, sir. [194]

Mr. Gibson: That would not be binding upon the defendant here. There is no privity between Matthews and the defendant.

Mr. Watts: We concede that, but there is a reimbursible feature, and the real party is the plaintiff and the Government.

Mr. Gibson: Why didn't you sue them?

The Court: That is immaterial at this time, gentlemen. This contract is between the plaintiff and the defendant. Now, this should not influence, and would not influence the Court. If the case were being tried before the jury, it might have some influence, but I can assure you it does not influence the Court in any way.

Q. (Mr. Watts, continuing:) Mr. Borst, will you please identify the document marked Exhibit No. 29, for the record.

(Whereupon the document referred to was marked Plaintiff's Exhibit 29, for purposes of identification.)

A. That is a letter addressed to Cory, Joslin & Macnsons from the Power Service Corporation. It is dated [195] February 21st, 1945.

Mr. Watts: I offer in evidence Plaintiff's Ex-

(Testimony of W. Lyle Borst.)

hibit No. 29, which the witness has identified as a letter dated February 21st, 1945, to Cory, Joslin & Macnsons, Kansas City, Missouri, and it is as follows:

“Gentlemen:

“We wish to place before you, for your consideration, our claim for additional compensation in connection with our L. S. Contract No. 5 to F. F. Construction Subcontract No. 5, Principal Contract No. W-461-Eng-10274, dated July 11th, 1944.

“We make this claim for additional compensation on the basis of the fact that major and important materials were not on the job when required. Because of this delay in receiving these materials we were unable to make the progress which we would otherwise have been able to make.

“We refer particularly to the water-wall tubes for all three boilers, which were not on the job when work began. Also we refer to water-wall headers which were furnished in error, and for which entirely new headers had to be furnished.

“The importance of having these tubes and headers on the job as required is very vital. The erection of [196] a steam generating unit is a type of work which must be done with a very definite sequence, and the installation of the water-wall tubes and headers comes very early in the order of work. These headers and tubes must be installed and rolled in before the boiler can be given a hydrostatic test. The boiler must be tested before

(Testimony of W. Lyle Borst.)

any real amount of brickwork, insulation and casing can be installed. This work must be complete before instruments, piping, combustion control miscellaneous boiler trim can be installed.

"The delays on these headers and tubes are as outlined below. The dates given as required dates are as provided in our original completion schedule.

"Boiler No. 1:

"Water-wall tubes required August 1st. Water wall tubes received August 17th. Water-wall tubes 16 days late.

"Boiler No. 2:

"Water-wall tubes required August 8th. Water wall tubes received September 20th. Water-wall tubes 43 days late.

"Boiler No. 3:

"Water-wall tubes required August 15th. Water-wall tubes received September 20th. Water-wall tubes 36 days late. Water-wall headers required at start of [197] Job—August 15th latest. Water-wall headers received September 26th. Water-wall headers 41 days late.

"A further delay was experienced because of the fact that a further error was made by the Boiler Company in fabricating water-wall header for No. 2 boiler. This header was made with holes for three and one-half inch tubes instead of three inch tubes. In order to overcome this situation the tubes were cut off and new stub ends supplied and welded on. These stub ends being three inch

(Testimony of W. Lyle Borst.)

on one end, and three and one-half inch on the other which accomplished a connection that otherwise could not have been made without an entirely new header. Work on this boiler was held up, from September 30th until October 18th because of this difficulty.

“We were also delayed because of boiler tubes for Boiler No. 3, which were found to be defective and had to be replaced.

“We make the claim for additional compensation to cover our costs of four weeks additional time required by us over the time which would have been required had the materials been on the job as needed. During these four weeks our general overhead expenses for supervision and for rental of equipment were as follows: [198]

“Supervision:

“W. Lyle Borst, Chief Engineer, \$400.00; expense \$150.00.

Emil Nelson, General Superintendent, \$400.00; expense, \$150.00.

O. C. Thorndsen, Piping Superintendent, \$673.00; expense \$150.00.

James A. Hobbs, Boilermaker Superintendent, \$676.00.

Ray B. Shaw, Purchasing Agent, \$400.00.

E. W. Ross, Chief Clerk, \$477.82; expense \$150.

James P. Krutzer, Senior Clerk, \$325.00.

Jack L. Wright, Junior Clerk, \$241.50.

(Testimony of W. Lyle Borst.)

Harvey Precht, General Boilermaker Foreman,
\$680.16.

Fred M. Goodsoe, General Piping Foreman,
\$596.60.

Rhea F. Moor, Material Control, \$484.69.

Clifford S. Boyle, General Millwright Foreman,
\$531.71.

Total—\$6,486.48.”

Then follows a subheading of “Equipment Rental,” and under that is itemized all of the rental equipment, naming each piece specified and the rate per month, and the total rental is extended, the total being \$1,989.00. Then is listed the profit amounting to \$847.54, which makes a total [199] of all of those items of \$9,323.02. And now I will read the balance of the letter:

“We wish to point out that we have not asked for any compensation for reduced efficiency in prosecuting this work. This reduction in efficiency was a very real thing, as we were unable to effect economies possible when one operation can be repeated without interruption by the same crew of men. This, of course, was not possible when the material was not on hand as required.

“We therefore ask that we be compensated only for the direct costs given herein in the amount of \$9,323.02 for the delays suffered on this work.

Yours very truly,

POWER SERVICE CORP.,

By W. LYLE BORST,

Chief Engineer.”

(Testimony of W. Lyle Borst.)

A carbon copy having been sent to Major James E. Matthews, Area Engineer, C. Howard Murphy of Lozier, Broderick & Gordon; J. S. Hagan of Lozier, Broderick & Gordon.

The Court: Is there any objection to the admission of this exhibit?

Mr. Scholz: No; except that it is claiming additional compensation under the contract.

Mr. Watts: No, sir; it is for breach of contract—[200] not additional compensation.

Mr. Scholz: It says that it is for additional compensation. The statement by counsel is not binding upon the Court or upon us.

The Court: It only goes to the question that at least they had asked for it.

Q. (Mr. Watts, continuing:) Now, Mr. Borst, what were the two items outside of profit for which you claimed direct expenses?

A. Some time for supervisory staff, and the equipment used on the job.

Q. Had you ever had any experience before in computing a claim for damages for breach of contract?

Mr. Scholz: That is objected to as incompetent, irrelevant and immaterial. The claim speaks for itself, and any attempt for any excess, or to make a larger claim, is not relevant here.

The Court: It may be admitted subject to your objection.

(Testimony of W. Lyle Borst.)

Q. (Mr. Watts, continuing:) Had you had any experience?

A. No; this was my first experience.

Q. You are not a lawyer? A. No, sir.

Q. Have you ever studied law? [201]

A. No, sir.

Mr. Scholz: I shall object to that as incompetent, irrelevant and immaterial. I will say that sometimes these people are better lawyers than those they employ.

The Court: At least he says he is not a lawyer.

Q. (Mr. Watts, continuing:) Did you ever—strike that, please. Did you get a reply to this letter of February 21st, 1945?

A. As I remember, we did—yes, we got a request for further information.

Q. I now hand you exhibit marked Plaintiff's Exhibit No. 31, and ask you to identify that for the record.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 31, for purposes of identification.)

A. That is a letter from Cory, Joslin & Macnsons addressed to the Power Service Corporation dated March 3, 1945.

The Court: Do you have any objection to this?

Mr. Scholz: No objection.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 31 for identification, was admitted in evidence.)

(Testimony of W. Lyle Borst.)

Mr. Watts: It is a letter addressed to the Power Service Corporation signed "Cory, Joslin & Macnsons, by Karl V. Vasicek, Project Manager," for Cory, Joslin & Macnson, the defendant, and it is addressed to Mr. Borst, that is, [202] called to the attention of Mr. Borst.

Q. (Mr. Watts, continuing:) Will you tell what happened so far as Mr. Wedlick is concerned as project manager?

A. Mr. Vasicek took his place as project manager.

Q. And was Mr. Wedlick on the job?

A. Not any longer, no, sir.

Q. This was after the completion of the contract, was it not? A. Yes, sir.

Mr. Watts: This letter reads as follows:

"Gentlemen:

"We wish to acknowledge your letter of February 21st, 1945, in regard to your claim for additional compensation in connection with Subcontract No. 5 to Lump Sum Contract No. 5.

"Before your claim can receive serious consideration it will be necessary for you to establish definite facts in connection therewith, some of which are as follows:

"1. The necessity of the large overhead as presented in the letter.

"2. Proof of ownership on all of the equipment mentioned.

(Testimony of W. Lyle Borst.)

“3. Necessity for retaining each and every piece of said equipment. [203]

“4. Certified receipts on the rental of this equipment.

You must realize that in order for Cory, Joslin & Macnsons to review a claim such as yours each and every fact has to be justified so that a recommendation may be made to the Area Engineer.

Very truly yours,

CORY, JOSLIN & MACNSONS,
By KARL V. VASICEK,
Project Manager.”

There was a carbon copy sent to Major J. E. Matthews; J. S. Hagan, and C. H. Murphy, and T. A. Dergance.

Q. (Mr. Watts, continuing:) What did you do after the receipt of this letter from the defendant dated March 3rd, 1945, Mr. Borst?

A. We prepared some supporting data.

Q. Did you write a letter subsequent to that date to the defendant with respect to this letter, in response to it?

A. I am sure that we answered the letter.

Q. Handing you what has been marked as Plaintiff's Exhibit No. 32 (1), will you identify that for the record, Mr. Borst?

(Whereupon document referred to was marked Plaintiff's Exhibit 32 (1) for purposes of identification.) [204]

(Testimony of W. Lyle Borst.)

A. It is a letter to Cory, Joslin & Macnsons from the Power Service Corporation dated March 19, 1945.

Q. Will you state whether or not you included a certificate from Fegels with respect to the rental of certain equipment? A. Yes, sir.

Q. Now, will you identify for the record exhibit which has been marked Plaintiff's Exhibit 32 (2) at this time.

(Whereupon document referred to was marked Plaintiff's Exhibit 32 (2) for purposes of identification.)

A. This was the list of equipment which had been brought to the job from the Fegels Construction Company.

Q. Now, identify exhibit 32 (2) for the record, Mr. Borst.

(Whereupon document referred to was marked Plaintiff's Exhibit 32 (2) for purpose of identification.)

A. That is a letter—that is what I meant, a letter from the Fegels Construction Company.

Q. Well, that is right. Will you identify No. 32 (3) for the record.

(Whereupon document referred to was marked Plaintiff's Exhibit 32 (3) for purposes of identification.)

A. That is a tabulation for the record giving its reason for use, and a statement of ownership.

Q. Attached to exhibit 32, give an outline of

(Testimony of W. Lyle Borst.)

each [205] exhibit that is attached thereto, and made a part of this reply to the letter of the defendant asking for additional information.

A. There are supporting letters and invoices from the various suppliers who furnished this equipment.

Q. What is the first?

A. The first is a statement of rental charges to the Power Service Corporation from E. T. Bennett, Lawrence, Kansas.

Q. And the next is what, Mr. Borst?

A. The next is a letter from English Brothers Machinery Company, Kansas City, Missouri.

Q. Is it a letter, or an invoice?

A. It is an invoice.

Q. And the next one is what?

A. An invoice from the Faeth Company, Kansas City, Missouri.

Q. And the next?

A. The next is from English Brothers Machinery Company of Kansas City, Missouri, and there is another from the same company, and then the next one is from the Faeth Company of Kansas City, Missouri, and the next is from the Gopher Equipment Company of Minneapolis, Minnesota. There is another from the English Brothers Machinery Company from Kansas City, Missouri; the next one is from S. D. Callaway Company of Kansas City, [206] Missouri. Do you want me to go through all of these?

(Testimony of W. Lyle Borst.)

Q. Yes; just state who they are from.

A. Well, here is one from Richards & Conover Hardware Company, Kansas City, Missouri; another from Grinnell Company, Minneapolis, Minnesota and St. Paul, Minnesota. The next one from the Minneapolis Iron Store, Minneapolis, Minnesota; the next one from the Victor L. Phillips Company, Kansas City, Missouri; another from the Victor L. Phillips Company of Kansas City, and the next one is from the same company; the next one is from the same company; and the next one is from the same company, that is, the Victor L. Phillips Company. The next one is from the Victor L. Phillips Company; the next one is from the Puritan Compressed Gas Corporation, Kansas City, Missouri; the next one from the Libby Welding Company, Kansas City, Missouri; the next is from the Libby Welding Company, Kansas City, Missouri; the next one is from Luthy Brothers, Incorporated, Kansas City, Missouri. The next one is from the same company, the Luthy Brothers. The next is from the Luthy Brothers, and the next one is from the Fegels Construction Company, Limited, Minneapolis.

Mr. Watts: Now, then the Plaintiff offers in evidence Exhibits 32 (1), 32 (2), and 32 (3).

The Court: Is there any objection?

Mr. Scholz: No objection. [207]

The Court: They may be all admitted.

(Whereupon Plaintiff's Exhibit 32 (1), 32

(Testimony of W. Lyle Borst.)

(2), and 32 (3), for identification admitted in evidence.)

Mr. Watts: Exhibit No. 32 (1) being a letter signed by W. Lyle Borst, addressed to the defendants in this case, and dated March 19th, 1945, reads:

“Gentlemen:

“We have your letter of March 3rd requesting further information regarding our claim for additional compensation in connection with our Subcontract No. 5 to Lump Sum Contract No. 5.

“In answer to the additional information which you request we will offer in the order requested.

“1. The necessity of the large overhead as presented in the letter.

“We have asked for payment on only the exact men whom we employed on this work continuously in supervisory and general overhead capacity. These men made up the minimum organization which could have been used in view of the large variety of work handled, and the trade unions' requirements. Basically, we employed five trades on this project, viz: Boilermakers; steamfitters; millwrights; brickmasons and pipe coverers. The last two mentioned were handled [208] by subcontracts. The boilermakers and the steamfitters both required a superintendent and foreman, while the millwrights required a foreman only. Obviously this organization could have supervised a larger number of workmen at one time so as to have com-

(Testimony of W. Lyle Borst.)

pleted the works sooner, had the materials been on hand as required. The other men, such as time-keepers, clerks, purchasing agents, etc., were all essential to the execution of the work, no matter how fast or slow the progress. We, therefore, have asked for compensation for this group of men whose performance was entirely governed by the availability of materials with which to work.

“2. Proof of ownership of all equipment mentioned.

“3. Necessity for retaining each and every piece of said equipment.

“4. Certified receipts on the rental of this equipment.

“We have prepared a tabulation on all of the equipment listed in our claim, which gives the ownership and/or rental suppliers' names, or invoices for this equipment, as the case may be. This tabulation also sets forth the operation for which this equipment was used.

“Invoices covering rental or purchase of the equipment [209] have also been enclosed.

“We trust this to be the information which you desire so that you may give full consideration to this claim.

Yours truly,

POWER SERVICE CORP.,
By W. LYLE BORST,
Chief Engineer.” [210]

(Testimony of W. Lyle Borst.)

Q. (Mr. Watts, continuing:) Now, turn back to Exhibit No. 32 (1), under paragraph numbered four, where it says, "We have prepared a tabulation on all of the equipment listed in our claim which gives the ownership and/or rental suppliers' names, or invoices for this equipment, as the case may be. [211] This tabulation also sets forth the operation for which this equipment was used. Invoices covering rental or purchase of the equipment may also be enclosed. We trust this to be the information which you desire so that you may give full consideration to this claim." Now, Mr. Borst, is this tabulation, marked Exhibit 32(3) the tabulation you referred to in that letter to the defendant?

A. Yes, sir.

Q. And are those letters the letters to which you referred? A. Yes, sir; that is right.

Q. I hand you Exhibit No. 33, and ask you to identify it for the record.

(Whereupon document referred to was marked Plaintiff's Exhibit 33, for purposes of identification.)

A. That is a letter to Cory-Joslin, dated June 6, 1945 from the Power Service Corporation.

Mr. Watts: I offer in evidence Exhibit No. 33 which reads as follows:

"Gentlemen: Attention Mr. Karl V. Vasecik.

"It has been some time since we have had any word from you relative to our contract settlement.

(Testimony of W. Lyle Borst.)

"Would appreciate your letting us know what the status of the matter is at this time. [212]

"Yours truly,

POWER SERVICE CORPORATION,

By W. LYLE BORST,
Chief Engineer."

The Court: Do you have any objection to that?

Mr. Scholz: Nothing.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 33, marked for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing:) I hand you document which has been marked as Plaintiff's Exhibit No. 34. Will you please identify that for the record?

(Whereupon document referred to was marked Plaintiff's Exhibit 34, for purposes of identification.)

A. That is a letter from Mr. Vasicek, or from Cory-Joslin & Macnsons, by Karl Vasiciek, addressed to the Power Service Company, and it is dated June 16th, 1945.

Mr. Watts: We offer this letter in evidence.

The Court: If there is no objection, it may be admitted.

Mr. Scholz: I will wait until Mr. Watts reads the letter.

Mr. Watts: It reads as follows:

"Attention W. Lyle Borst:

"In reply to your letter of June 6th, 1945 rela-

(Testimony of W. Lyle Borst.)

tive to the proceedings of your claim for additional compensation [213] to your contract settlement, we wish to advise that this claim has been turned over to the Engineering and Legal Departments for further investigation of facts relative to same. We expect a decision in the matter within the next few days, and at that time these findings will be presented to the resident engineer for his final disposition.

Yours truly,

KARL V. VASICIEK,
Project Manager."

and that shows a carbon copy to Mr. Hagen and to Phil Dergance.

Mr. Scholz: We have no objection.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 34, for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing:) I hand you Exhibit No. 35, will you identify that for the record, please?

(Whereupon Plaintiff's Exhibit 35, being document referred to, was marked for purpose of identification.)

A. It is a letter from the Power Service Corporation to Cory, Joslin & Macnsons, and it is dated June 30th, 1945.

(Testimony of W. Lyle Borst.)

Mr. Watts: This is a letter from the plaintiff to the defendant, and it reads:

“Gentlemen:

“In reference to our lump sum contract No. 5, to [214] F. F. Construction Subcontract No. 5, Principal contract numbered W-461, Engin.-10274, dated July 11th, 1944.

“On February 21st, 1945, we submitted a claim to your company for additional compensation in connection with the subject contract. Since submitting that claim we have given the matter further consideration and now withdraw,—wish to withdraw it, and submit in lieu thereof this revised claim for additional compensation.

“This claim is based upon the fact that due to misleading representations, and inconsistencies in the specifications and contract, the completion of the contract was delayed forty days, and seriously increased our cost of doing the work.

“The contract required completion of the work in one hundred twenty days, which would certainly have been accomplished had conditions prevailed that were set forth specifically in the contract documents.

“Paragraph 5-04 (c) of the contract specifications states: ‘Nearly all of the materials required for the work has been stored in Power House No. 1, or in warehouses adjacent thereto.’ We maintain that nearly all of the materials required for the work were not stored in Power House No. 1 or in warehouses adjacent [215] thereto.

(Testimony of W. Lyle Borst.)

“The contract under paragraph of 1-05 of the specifications states: ‘The subcontractor will be required to commence work under the subcontract within five calendar days after the date of receipt by him of notice to proceed, and will be required to prosecute the said work faithfully and energetically, and to complete the work within one hundred and twenty calendar days, the time to be computed from the said date of receipt of notice to proceed, except as provided hereafter in this paragraph.’ This paragraph 1-05, coupled with paragraph 5-04, is seriously misleading to the bidder, and when submitting his proposal the bidder rightly assumed conditions that did not exist, and as a consequence he bid a lower figure than he would have had the true facts been available to him. Completion in one hundred twenty days, as required, becomes a physical impossibility because an important part of ‘the materials required’ were not available.

“The critical materials that seriously delayed and interfered with the construction program were, viz: The water-wall tubes for all three boilers, and water-wall headers for No. 3 boiler which were not manufactured correctly and had to be replaced, and [216] header for No. 2 boiler which was manufactured incorrectly, having three and one-half inch diameter holes instead of three-inch holes, and making it necessary to cut off the ends of all of the tubes entering these holes, and weld on a short sec-

(Testimony of W. Lyle Borst.)

tion of the tube formed as an increaser to fit the three and a half inch hole drilled in error.

“Our proposal and construction program to meet the contract conditions required that these important items were to be on the job available for installation when needed. The installation of the water-wall tubes should be done early in the erection program, and their installation must be completed before the erector can proceed with the hydrostatic tests, the erection of the boiler brickwork and casing, boiler piping, combustion control and boiler trim.

“After being awarded the contract, and while taking inventory of the boiler materials, it was discovered that these serious shortages existed. To the best of our knowledge no one connected with the Area Engineer's office, Lozier, Broderick & Gordon, or Cory, Joslin & Maensons organization was aware of this shortage until after the contract had been awarded. In the time allowed for preparation of the bid, it [217] would have been impossible for any bidder to have determined by observation prior to the letting whether or not there was a shortage of this material, as to have done so would have required the moving and handling of several hundred tons of material, and would have required much more time than was available.

“The delay occasioned by the shortages of the above-mentioned major equipment is scheduled as follows: Where we have stated ‘material required,’ that is the date on which materials should be avail-

(Testimony of W. Lyle Borst.)

able if we were to complete the contract in the one hundred twenty days allowed."

And then follows the exact enumeration of boiler one, two and three, and I see no necessity of reading that, and then we proceed again:

"These delays, as listed above, show a full delay of forty-three days, and we therefore claim the total delay of forty days, which we were actually on the job over and above the one hundred twenty days prescribed by the contract, Paragraph 1-05 of contract specifications.

"Our claim follows: We claim for additional compensation to cover our costs for forty days additional time required by us over and above the one hundred twenty days stipulated by the contract. Notice to [218] proceed with the work was received on July 13, 1944, so that we should have completed our work on November 9th, 1944, but due solely to shortage of critical items of material we did not complete our contract until December 19, 1944, making a delay of forty days. During these forty days our general overhead expense for supervision and for rental equipment was as follows:"

And then follows the same enumeration as to that, and these different sums total \$5,759.94, and with the payroll taxes and social security, amounting to \$198.39, it makes a total of \$5,958.33, which was for supervision, and there is a note at the bottom, "Expenses paid for all personnel from home office." Following that item of supervision expense comes the schedule headed, "Equipment rental

(Testimony of W. Lyle Borst.)

schedule," which is \$2,313.33, making a total of \$8,271.66, with an overhead amounting to \$827.16, which makes a total of \$9,098.82. Added to that is an item of "margin, ten per cent, \$909.88, which makes a total of \$10,008.70, and then follow the last two paragraphs of that letter which read as follows:

"We feel that we are entitled to this additional compensation because had we based our proposal on completion in one hundred sixty days instead of one hundred twenty days these figures would have been [219] included in our estimate and computations, but due to the misleading information and inconsistencies in the contract documents we could not have foreseen the forty days delay, and therefore could not make provision for it when bidding.

"We wish to point out that our operations, although purposely curtailed and paced to the one hundred sixty days was at all times up to the revised schedule, and had the materials been available there is no doubt but that the one hundred and twenty days contract date would have been realized.

Yours truly,

POWER SERVICE
CORPORATION,

By W. LYLE BORST."

Q. (Mr. Watts, continuing:) Did you get a reply to this? A. Yes, sir.

Q. I now hand you exhibit marked Plaintiff's Exhibit No. 36, will you identify that for the record?

(Testimony of W. Lyle Borst.)

(Whereupon document referred to was marked Plaintiff's Exhibit 36, for purposes of identification.)

A. It is a letter addressed to the Power Service Corporation from Cory, Joslin & Macnsons. It is dated July 11th, 1945. [220]

Mr. Watts: I offer in evidence Plaintiff's Exhibit No. 36. if the Court please.

The Court: If there is no object to No. 35, it will be admitted.

Mr. Gibson: All this is subject to the blanket objection.

The Court: This would not be subject to the other objection, would it? It does not apply to the damages?

Mr. Watts: It applies to both claims.

The Court: Very well. You may go ahead.

(Whereupon, Plaintiff's Exhibit No. 36, for identification, was admitted in evidence.)

Mr. Watts: This letter, Exhibit No. 36, reads as follows:

"Attention Mr. W. Lyle Borst, Chief Engineer.

"Re: Claim of Power Service Corporation against Cory, Joslin & Macnsons for compensation in addition to contract price set forth in L. S. Subcontract No. 5 to F. F. Construction Subcontract No. 5, to Principal Contract No. W-461-Eng. 10274.

"Gentlemen:

"This again acknowledges receipt of your letter of February 21, 1945, in which you demand compensation in the amount of \$9,323.02, in addition to

(Testimony of W. Lyle Borst.)

the contract [221] price set forth in the above mentioned L. S. subcontract by reason of your statement 'Major and important material was not on the job when required', particularly water-wall tubes and proper water-wall headers. Further, this acknowledges receipt of your certificate of ownership of certain items of equipment, dated March 14th, 1945, and also your letter of March 19th, 1945, with its enclosed receipts for the payments of rentals by you on certain rented equipment. This letter also acknowledges receipt of your letter of June 30th, 1945, under and by the terms of which you have revised your demand as set forth in your letter of February 21st, 1945, to the extent that the original amount thereof has been increased to \$10,-008.70.

"Please be advised that Cory, Joslin & Macnsons has made a careful study of the facts stated in all of the foregoing letters as a result of which Cory, Joslin & Macnsons is unable to determine, first, the actual number of days of delay, if any, chargeable to the alleged delayed delivery of water-wall tubes and proper water-wall headers; second, the true and correct amount of your claim; and third, the part of your claim, if any, properly chargeable to the alleged delay of delivery of said materials.

"Accordingly, Cory, Joslin & Macnsons is herewith [222] denying your claims, and both of them, in their entirety.

"In connection with this denial your attention is

(Testimony of W. Lyle Borst.)

directed to paragraph 1-11 of the specifications attached to and made a part of said L. S. Subcontract No. 5, and to Article Six on page 8-D of said subcontract.

Very truly yours,

CORY, JOSLIN & MACNSONS,
By CARL V. VASICIEK,
Project Manager,"

and that indicates that a carbon copy was sent to P. Dergance, J. Hagan, and Major Thomas.

The Court: So that the record will be clear, this general objection only runs to the testimony in regard to the additional amount of the claim that was filed after the receipt given in settlement. I take it there is no general objection to this exhibit.

Mr. Gibson: I understood that we had an objection against the admission of this testimony with reference to Counts two and three, with reference to the reformation of the contract.

The Court: I am afraid that Counsel has gotten away from that phase of it. There was a statement made that when you were introducing testimony in connection with Count [223] that you were doing it, and so that the record would be clear, you were to tell us that the testimony was being offered in support of Counts two and three. Now, I take it that a good deal of the testimony has been introduced on these various counts?

Mr. Watts: That is right, and I neglected to call your Honor's attention to it.

(Testimony of W. Lyle Borst.)

Mr. Gibson: I thought this was all in support of Counts two and three, and I understand now this is going in as to the Count one.

The Court: I think we will have to have that understanding. I think you are right that some of this would not be admissible to Count one, but a great deal of it is put in as to Count one. When Counsel left Counts two and three he was to say that the testimony he was now introducing was in support of Count one.

Mr. Watts: That is true. I neglected to advise your Honor, but I will say that I am inclined to think that this would be admissible under either of the counts.

Mr. Gibson: I take it from counsel's statement that if this was admissible it was admissible under Count one as well as under Counts two and three. For the sake of the record I would like to have the objection go to Count one. If the Court reforms the contract as suggested in [224] Count two then this would be admissible under Count three, and I register my objection to this under Count one now, **that is, under the contract as it now exists under Section 1-05 of the general clause, and under Article three of the subcontract.** They show receipt of a lump sum and nothing else.

The Court: This testimony does not prove anything. It simply shows the actions on the part of the plaintiff in presenting its claims.

Mr. Gibson: I am referring now, your Honor, to the bulk of the testimony introduced here. When

(Testimony of W. Lyle Borst.)

the Court said that counsel should let him know when he was putting in testimony as to Count one,—

The Court (interposing:) He is on the question of damages, as I understand it.

Mr. Gibson: I understand his purpose is to offer it as such, and I want to object to it as not admissible under the contract.

Mr. Watts: I offer it for both Counts,—Count one and Count three. My understanding of the procedure under the new rules that the Court is now acting under, and I understand will follow the rules in effect now, and under those I understand the Court is now receiving testimony, and that that testimony may apply to any issue in the action.

The Court: Yes, that is true, but counsel is entitled to have his record, so that a ruling of the Court may be made and so that it be may reviewed by the Higher Court if necessary, and they have not had an objection in the record as to Count one at this time, and the Court stated to you, Mr. Watts, that whenever you transferred back to Count one you would advise the Court, and then this general objection would be made, if they desired. I think the only way to handle it is that the general objection,—I am not sure how to handle it. The Court is in the position of determining now what proof applies to Count one, if it does, and rule that it does apply to that Count. I think I will ask that the objection be reinsated in the record so that they

(Testimony of W. Lyle Borst.)

would not be waiving their right to the objection to any testimony in here as to Count one.

Mr. Watts: And may the record show from this point forward that I am offering all the testimony as to Counts one, two and three.

Mr. Gibson: At this time I want the record to show that we object to any testimony on the question of damages as to Count one, on the theory that Count one covers the contract as is, and does not provide for any damages. It is incompetent, irrelevant and immaterial, and without the terms of the contract as written. [226]

Mr. Watts: I think that is premature. I am not proving the measure of damages. I am establishing that the claim was made and filed. I am not trying to prove damages now. I am establishing the fact that we made a claim, and then we will come back and establish the damages later.

The Court: I am not sure now what state the record is in, but I think you may proceed, and in making my rulings I will endeavor to clear this up.

Q. (Mr. Watts, continuing:) Will you please identify Exhibit No. 37 for the record?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 37 for purposes of identification.)

A. That is a letter addressed to Cory, Joslin & Maensons from the Power Service Corporation.

Mr. Watts: I offer Exhibit No. 37 in evidence at

(Testimony of W. Lyle Borst.)

this time. It is a letter,—and if there is any question about the previous exhibit, I will re-offer that.

The Court: That is the letter denying liability?

Mr. Scholz: We have no objection to that.

The Court: It may be admitted.

(Whereupon Plaintiff's Exhibit 36 for identification, was admitted in evidence.) [227]

Q. (Mr. Watts, continuing:) Now, will you please identify exhibit marked No. 41 for the record?

(Whereupon document referred to was marked Plaintiff's Exhibit 41 for purposes of identification.)

The Court: Mr. Watts, what happened to Exhibit No. 38?

Mr. Watts: No. 38 was introduced some time ago, and as I recall now it was also read into the record.

The Court: Very well. I was not exactly clear on that. You may proceed.

Q. (Mr. Watts, continuing:) Now, Mr. Borst, identify Exhibit No. 41 for the record.

A. No. 41 is the copy of a letter to Major Thomas,—Major Homer D. Thomas, Area Engineer, and it is from the Power Service Corporation. It is dated July 24th, 1945.

Mr. Watts: We offer Exhibit No. 41 in evidence, which is as follows:

(Testimony of W. Lyle Borst.)

“Dear Major Thomas:

“Reference our Lump Sum Contract No. 5 to F. F. Construction Subcontract No. 5, Principal Contract No. W-461-Eng.-10274, dated July 11th, 1944.

“On June 30th, 1945, we submitted a claim to [231] Cory, Joslin & Macnsons for additional compensation in connection with the subject contract. This claim was submitted in lieu of a similar claim which had been made on February 21st, and which we withdrew.

“This claim of June 30th, 1945, has been denied by Cory, Joslin & Macnsons and we are now submitting this claim to you.”

and then follows the claim, which totals \$10,008.70.

The Court: Is there any objection?

Mr. Scholz: I understand you are filing the claim pursuant to contract 1-11, and if denied you may take an appeal under the contract. If that is the purpose we have no objection. If there is any other, or any hidden purpose, we will object.

Mr. Watts: I will tell you the purpose: The purpose is to bring all of the facts before the Court. The truth of the matter is that under the law the plaintiff had no right to follow the procedure it is following. We are coming to the point where the chief engineer ruled this was not proper procedure. We cannot file a claim for damages before the Engineer, and that we had to come to a civil court.

The Court: That is a matter for the Court's decision. This exhibit may be admitted. [232]

(Testimony of W. Lyle Borst.)

Q. (Mr. Watts, continuing:) Will you please identify Plaintiff's Exhibit No. 41-A?

(Whereupon document referred to was marked Plaintiff's Exhibit 41-A for purposes of identification.)

A. It is a letter from the War Department, United States Engineers' Office, to the Power Service Corporation, dated August 31st, 1945.

Q. Signed by whom?

A. Signed by Major Thomas.

Mr. Watts: I will read this letter.

The Court: Before you start on that, Mr. Watts, we will take a recess for fifteen minutes.

March 20th, 1947, 3:15 p.m.

Mr. Watts: I now offer in evidence exhibit which has been marked Plaintiff's Exhibit 41-A. It is a letter dated August 31st, 1945, addressed to the Power Service Corporation, Minneapolis, Minnesota.

Mr. Gibson: We object to it as incompetent, irrelevant and immaterial, to either the point of reformation of the contract, or the question of damages. Counsel has made a statement here as to his remedy being by claim in a court of competent jurisdiction.

The Court: You may read the exhibit. The Court will rule later on this. [233]

Mr. Watts: Exhibit No. 41-A is as follows:

"Gentlemen:

"Reference is made to your letter of July 24th, 1945 appealing (under Article Six of your subcon-

(Testimony of W. Lyle Borst.)

tract) from the denial of your claim by Cory- Joslin & Macnsons for payment of \$10,008.70 as additional costs incurred as a result of the increased time for **completion of your subcontract No. 5 to F. F. Construction Subcontract No. 5 to principal contract No. W-461-Eng.-10274.** Said subcontract No. 5 provides for the complete erection of boilers in Power House No. 1 at the Sunflower Ordnance Works, Johnson County, Kansas.

“Your acceptance of the subject subcontract was qualified (in anticipation of filing the subject claim) by attaching thereto the following quoted appendage:

“‘This contract is signed and executed by the Power Service Corporation without any intent on the part of the Corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials notwithstanding the provisions of paragraph 1-05 of the specifications.’

“Your rights to file claims as asserted in the above quotation, were fully protected and provided for [234] in Article six of the subcontract and paragraph 1-11 of the specifications thereto. The undersigned finds, however, that the above quoted appendage in no manner modifies the provisions of the subcontract or specifications made a part thereof, and therefore the bearing of paragraph 1-05 of the specifications (referenced in the appendix) on the subject claim must be considered in the light of the

(Testimony of W. Lyle Borst.)

express unaltered wording thereof as hereinafter set forth.

“Subparagraph (a) of article one of the subcontract provides that the work performed under the subcontract must be commenced and completed in accordance with paragraph 1-05 of the specifications. Subparagraph (a) of said paragraph 1-05 provides as follows:

“‘The subconstructor will be required to commence work under the subcontract within five calendar days after the date of receipt by him of notice to proceed, and will be required to prosecute said work faithfully and energetically, and to complete the work within one hundred twenty calendar days, the time to be computed from said date of receipt of notice to proceed, except as provided hereafter in this paragraph.’

“Inasmuch as you acknowledged receipt of the notice to proceed on July 13th, 1944, you were (in accordance [235] with the above quoted paragraph) required to complete performance by November 10th, 1944.

“All work was not, however, completed by the aforementioned date of November 10th, 1944, and it was considered that an extension of thirty-six calendar days (or to December 16th, 1944) was justified. Accordingly, Modification No. 3 Change Order providing in part for such extension was submitted to you for acceptance. You refused to accept the time extension on the basis that acceptance of same would possibly constitute a waiver of

(Testimony of W. Lyle Borst.)

your rights to reimbursement of the increased costs incurred during the thirty-six calendar days increased time for completion. In accordance with your request, Modification No. 3 was rewritten, and as finally executed provided only for construction change items and no provision was made for additional time.

“Your attention is invited to the fact that your refusal to accept the additional time originally provided in Modification No. 3 was contrary to that portion of Paragraph 1-05 (e) which stipulates that ‘It is distinctly understood and agreed that the sub-constructor will accept additional time,’ (underscoring supplied) “as authorized in said modification.

“It is further found that the entire amount claimed [236] (\$10,008.70) represents your computation of expenses incurred during the increased time for completion. Allowance of such costs is expressly prohibited by paragraph 1-05 (e) in accordance with which you are required to accept any additional time allowed ‘in full satisfaction of the delays encountered’ and Cory, Joslin & Macnsons ‘will not be liable for any expenses incurred by the subconstructor as a result of the increased time for completion.’ (Underscoring supplied.) The contracting officer finds that your claim is on a basis clearly in direct contradiction to the latter quoted provisions.

“Your claim is, therefore, denied.

(Testimony of W. Lyle Borst.)

"Your attention is invited to your rights to appeal to the Chief of Engineers from the foregoing decision within thirty days from the date of this decision, as provided in Article Six of the sub-contract. Processing of such an appeal through the undersigned Contracting Officer will expedite action thereon.

Sincerely yours,

HOMER D. THOMAS,

Major, Corps of Engineers,

Contracting Officer." [237]

Mr. Gibson: My objection is before the Court. I don't see what it has to do with this case. It is an attempt to have this Court affected by the ruling of the Area Engineer.

The Court: I think that is correct. It would only be admissible as showing the different steps taken by the Engineer, and it could not influence this Court. That is plain to be seen, that this Court could not be influenced by that decision, because this decision is up to the Court, and not to the engineer. I am going to accept this exhibit, just for the reason that I don't want to pass finally on this question hurriedly. It will be accepted subject to the objection, and it will also be understood that a motion to strike is made at this time. The Court will take it under advisement, but I cannot now see any purpose for its admission except to show the steps taken in connection with his contract, and the fact that he had presented his claim.

(Testimony of W. Lyle Borst.)

Mr. Watts: Very well. Your Honor. Now, I will proceed with my examination.

The Court: Yes; go ahead.

(Whereupon Plaintiff's Exhibit 41-A for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing:) Please identify Exhibit [238] No. 42 for the record now, Mr. Borst.

(Whereupon document referred to was marked Plaintiff's Exhibit 42, for purposes of identification.)

A. Exhibit No. 42 is a letter dated September 7th, 1945, addressed to the United States Engineers' Office, Sunflower Ordnance Works, Kansas City, Missouri, and it is from the Power Service Corporation.

Mr. Watts: I offer in evidence Exhibit No. 42, which is signed by Mr. Borst, and addressed to the United States Engineers' Office for the attention of Major Homer D. Thomas, Contracting Officer.

Mr. Gibson: May my last objection apply to the proposed exhibit, which is No. 42, as I understand it?

Mr. Watts: That is right, Exhibit No. 42.

Mr. Scholz: So that the Court may be fully advised, I think your Honor should keep in mind this Article Six, which is as follows: "All disputes concerning questions of fact arising under this subcontract shall be decided by the Contracting Officer, whose decision shall be in writing, subject to appeal by either party hereto within thirty days from the receipt of the Contracting Officer's decision to the

(Testimony of W. Lyle Borst.)

Chief of Engineers, whose decision shall be final and conclusive upon the parties hereto. Notwithstanding this provision, the subconstructor shall diligently proceed with the [239] work as directed."

The Court: I see your position, but it is a matter that I don't want to pass on hastily. You may proceed, Mr. Watts.

Mr. Watts: This letter reads,—it has reference to the same contract that we have referred to in many of these other exhibits:

"Receipt is acknowledge of your letter of August 31st reference to our claim for additional costs incurred on the subject contract with Cory, Joslin & Macnsons.

"We wish to exercise our right of appeal to higher authority, in this case the Chief of Engineers. We therefore request that you forward our claim to the Chief of Engineers for further consideration.

"We note what you say with reference to the terms of the contract, but you have not touched upon and apparently given no consideration to the fact that there was a breach of contract on the part of Cory, Joslin & Macnsons. It was their contractual obligation to supply the materials for construction, and these were stated to be nearly all on the site at the time the contract was made. We quote paragraph 5-04 (c) of the specifications, as follows: 'Nearly all the materials required [240] for the work has been stored in Powerhouse No. 1, or in warehouses adjacent thereto. Materials, equip-

(Testimony of W. Lyle Borst.)

ment and machinery which have been stored, and which have been subjected to the conditions necessitating reconditioning, refinishing, re-facing, cleaning, painting, packing (in valves and pumps) and similar work to properly prepare for installation and operation, will be reconditioned, refinished, etc., by the subcontractor as a part of this subcontract, except, however, that such reconditioning, refinishing, etc., shall apply only to the defects have resulted from storage, and does not include inherent defects in manufacture or materials. Materials, equipment and machinery which have been broken, or otherwise damaged beyond use or repair during storage, or which have inherent defects in manufacture of materials caused through no fault or negligence of the subcontractor will be replaced by the constructor without cost to the subcontractor.' These were not nearly all on the site at the start of the work. The shortages have been covered in our claim of July 24th, 1945.

"This defection on the part Cory, Joslin & Macnsons made fulfilment of the obligation to complete on November 10th, 1944, impossible for this contractor to accomplish. [241]

"This serious breach of the contract on the part of Cory, Joslin & Macnsons caused the serious financial loss as set forth in our claim.

"We assume that you have all of the information necessary to institute the appeal to the Chief of Engineers. We will at this time add nothing to our claim of July 24th, 1945, and presume that the orig-

(Testimony of W. Lyle Borst.)

inal claim with this letter is all that is needed for presentation to the Chief of Engineers.

Yours very truly,

POWER SERVICE CORPORATION,

By W. LYLE BORST,

Chief Engineer."

Q. (Mr. Watts, continuing:) Was your claim so submitted?

Mr. Gibson: This is the first time, the first letter, or any indication that the plaintiff is accusing the defendant of the breach of contract. It is not a letter addressed to the defendant, but to the United States Engineers' Office. It is not a direct letter to us. I don't think it is admissible.

The Court: I feel, perhaps, that counsel for the defendant is correct. However, I am going to admit subject to a motion to strike, and subject to this objection, and I will consider that the motion to strike has been made at this time, and will take it under advisement. [242]

(Whereupon Plaintiff's Exhibit 42, marked for identification, was admitted in evidence.)

Q. (Mr. Watts, continuing:) Do you know, Mr. Borst, whether the claim was submitted,—strike that please. Mr. Borst, do you know whether or not the claim you submitted to the Area Engineer was sent to the Chief of Engineers? If not, what happened?

A. As I remember, it was sent on directly.

(Testimony of W. Lyle Borst.)

Q. I will ask you now to identify what has been marked as Plaintiff's Exhibit No. 43.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 43, for purposes of identification.)

A. That is a letter addressed to the Chief of Engineers, U. S. Engineers Office in care of Major Howard D. Thomas, Contract Officer, Sunflower Ordnance Works, Kansas City, Missouri. It is dated September 29th, 1945.

Q. And what occasioned your writing a letter to the Chief of Engineers?

A. In view of our having been denied our claim from the Major at Sunflower.

Q. Did the Major send forward your appeal as requested?

Mr. Scholz: That is objected to. It is immaterial.

A. I believe this is a continuation of the same claim made through the Chief of Engineers. [243]

Q. This is addressed to the Chief of Engineers?

A. Yes, sir.

Q. Do you know whether the claim you submitted to the Area Engineer was, or was not, forwarded to the Chief Engineer, and that you were required to do so?

A. I think that was covered by a clause that could be interpreted,—

Mr. Scholz: (Interposing:) We will stipulate that he received a reply from the Chief of Engineers, or whoever it was, that under the contract

(Testimony of W. Lyle Borst.)

had required that he address it to the Chief Engineer and send it through the proper channels.

Mr. Watts: What happened was this: The Area Engineer refused to send it forward, and instead of writing a letter he told us to make a claim direct to the Chief Engineer.

Mr. Scholz: Yes, and send it through the proper channels.

Mr. Watts: We asked for it to be done that way, and the Area Engineer refused, and we sent it direct to the Chief Engineer.

Mr. Scholz: May I call the Court's attention to paragraph 1-11 of the contract, under the general provisions and specifications, and it reads: "If the subcontractor considers any work demanded of him to be outside of the [244] requirements of the subcontract, or if he considers any action or ruling of the constructor, of the inspectors, to be unfair, the subcontractor shall, without undue delay, upon such demand or ruling, submit his protest thereto in writing to the Contracting Officer, stating clearly and in detail the basis of his objections. The contracting officer shall thereupon promptly investigate the complaint and furnish the subcontractor his decision thereto in writing. If the subcontractor is not satisfied with the decision of the contracting officer, he, within thirty days, appeal in writing to the Chief of Engineers, whose decision, or that of his duly authorized representative, shall be final and binding upon the parties to the contract. Except for such protests or objections as are made of

(Testimony of W. Lyle Borst.)

record in the manner herein specified, and within the time limit stated, the records, rulings, instructions or decisions of the contracting officer shall be final and conclusive. All appeals from the decisions of the Contracting Officer authorized under the subcontract shall be addressed to the War Department, Chief of Engineers, Washington, D. C. The appeal shall contain all the facts or circumstances upon which the subcontractor bases his claim for relief and should be presented to the contracting officer for transmittal within the time provided therefor [245] in the subcontract."

A. That is what we did here.

Mr. Watts: We offer Exhibit No. 43:

"Chief of Engineers,

United States Engineers Office,

C/o Major Homer D. Thomas, Contracting Officer, Sunflower Ordnance Works, P. O. Box 36, Kansas City, Missouri,"

and then it shows the subject matter as being the same contract that we have referred to on numerous occasions here.

"Gentlemen:

"On September 7th we submitted a request to Major Thomas asking that he pass on to the Chief of Engineers our claim of July 24th, 1945 for additional costs incurred on the subject contract with Cory, Joslin & Macnsons. We have now been advised by Major Thomas that it is necessary for us

(Testimony of W. Lyle Borst.)

to present our claim to the Chief of Engineers, instead of requesting that it be passed on by him.

“We hereby state our claim.

“In connection with our Lump Sum Contract No. 5 to F. F. Construction subcontract No. 5, Principal Contract No. W-461-Eng-10274, dated July 11th, 1944, we make claim for additional compensation.” [246]

Then there is a copy of exactly the same letter that has been before this Court, at least four times, giving the dates when the material was required, and a list of the names of the employees and the amounts paid to the various employees, and the total amount of the claim.

The Court: Is there any objection to this exhibit?

Mr. Scholz: The same objection that was made before.

The Court: And the same ruling.

Q. (Mr. Watts, continuing:) In connection with that, the report was sent forward to the Chief of Engineers? A. That is right.

Q. And is that the letter sent with the findings of fact which you have in your hand now?

A. Yes; this is the letter to the Power Service Corporation,—

Q. (Interposing:) What is the document attached to it, Mr. Borst?

A. That is the findings of fact by that engineer.

(Testimony of W. Lyle Borst.)

(Whereupon Plaintiff's Exhibit 43, for identification, was admitted in evidence.)

Mr. Watts: We offer in evidence Exhibit No. 44.

The Court: Is there any objection? [247]

(Whereupon document referred to was marked Plaintiff's Exhibit 44 for purposes of identification.)

Mr. Scholz: The same objection we made to the former documents.

The Court: I cannot see where it is material, but I will make the same ruling.

(Whereupon Plaintiff's Exhibit 44 for identification, was admitted in evidence.)

Mr. Watts: This letters is dated the 8th of November, 1945, addressed to the Power Service Corporation, Wesley Temple Building, Minneapolis, Minnesota:

"Gentlemen:

"Reference is made to your appeal dated the 29th of September, 1945, to the Chief of Engineers under your subcontract No. 5 at this project. Inclosed is your copy of the findings of fact in connection with the appeal. Additional copies of the findings of fact, together with your appeal, will be forwarded to the Chief of Engineers for his consideration in rendering a decision in the case. You are hereby invited to submit to this office, within fifteen days from the date of this letter, any com-

(Testimony of W. Lyle Borst.)

ments concerning the findings of fact that you might consider appropriate. Such comments will be forwarded [248] with your appeal. The appeal will be forwarded at the end of said fifteen days, in the event no comments are received.

Sincerely yours,

HOMER D. THOMAS,

Major, Corps of Engineers,
Contracting Officer."

and this indicates a carbon copy to Cory, Joslin & Macsons together with a copy of the findings of fact. The findings of fact which are attached to the letter I just read are as follows:

"FINDINGS OF FACT

"Appeal of Power Service Corporation from denial of its claim for \$10,008.70, representing alleged increased costs incurred as the result of delays in completion of work under Lump Sum Contract No. 5, to Fixed Fee Subcontract to No. 5 to Principal Contract No. W-461-Eng.-10274.

"The contract:

"The contract involved is Lump Sum Contract No. 5 to Fixed Fee Subcontract No. 5 to Principal Contract No. W-461-Eng.-10274; Lump Sum Contract No. 5 in the original amount of \$448,000.00 was entered into 11th July 1944 by and between W. E. Joslin, an individual of the City of San Francisco, in the State of California, [249] doing

(Testimony of W. Lyle Borst.)

business as the Cory, Joslin & Macnsons, the Fixed Fee plumbing, heating and ventilation construction subcontractor at the Sunflower Ordnance and Power Service Corporation, with principal offices in Minneapolis, Minnesota. It provides for the erection of three boilers in Power House No. 1 at Sunflower Ordnance Works. Cory, Joslin & Macnsons is referred to in the subcontract as the "constructor," and the appellant is referred to as the "Subconstructor,"

"The claim:

"The appeal dated 29 September 1945 is from a decision of the Contracting Officer denying the subcontractor's claim dated 24 July, 1945, in the amount of \$10,008.70 for increased costs alleged to have been incurred by claimant due to delays in completion of the work beyond the date fixed for such completion in the subcontract. It is alleged by claimant that the delay in completion of the work under the subcontract was the result of delays on the part of Cory, Joslin & Macnsons in furnishing water-wall tubes and water-wall headers.

"The findings:—"

Mr. Gibson: You are now reading from those Findings of Fact, are you, Mr. Watts? [250]

Mr. Watts: Yes, I am.

Mr. Gibson: We object as not within the power of the officer. That, Congress says, must be passed upon by a Court of competent jurisdiction, the Court of Claims.

(Testimony of W. Lyle Borst.)

The Court: I will admit it with the same understanding as to the others.

Mr. Watts (Continuing reading):

“Subparagraph 1:

“Article 1 and subparagraph 1-05 of the specifications provide that the work shall be commenced within five calendar days after the date of receipt of Notice to Proceed, which date is 13 July, 1944. Subparagraph 1-05 (a) further provides that the work shall be completed within one hundred twenty calendar days from said date of receipt of Notice to Proceed. Three contract modifications were issued, none of which provided for extensions of the contract period. Accordingly, the subcontract should have been completed on 10 November 1944. Actually, the work was completed 19 December, 1944, or thirty-nine days after the date specified for completion. The appellant, using the same dates, states that the subcontract work was completed forty days late. By letter dated 10 November 1944 (Exhibit A) the subcontract completion date, the [251] sub-constructor put the constructor on notice that due to pauses listed in the letter which dealt with the delayed delivery of materials the work had not been completed and an extension of time was requested. (Also see paragraph four in connection with notice of delays.) It is estimated before actual completion was accomplished that the work would be completed by 16 December and a change order, modification No. 3, was issued providing for an extension of time until 16 December. The sub-

(Testimony of W. Lyle Borst.)

constructor refused to accept the time extension on the basis that to do so might possibly constitute a waiver of its rights to reimbursement of increased costs considered to have been incurred as a result of the increased time for the completion of the work. The modification was rewritten to provide only for construction changes, without provision therein for additional time. The time extension was offered the subcontractor in accordance with subparagraph 1-05 (d) and (e) of the specifications, which are quoted as follows:

“1-05 (d): ‘If the subcontractor fails to perform the work at a rate satisfactory to the constructor as specified in said section (a) above by reason of delays in the delivery of materials or supplies essential to [252] such performance because of war priorities or because of conditions existing through no fault or negligence of the subcontractor, he may be excused from such failure upon the presentation to and the approval by the constructor of a written statement setting forth distinctly the causes for such failure.

“1-05 (e). In case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the subcontractor will accept the additional time in which to complete the subcontract in full satisfaction of any delays encountered, and the constructor will not be liable for any costs or expenses incurred by the subcontractor as a result of the

(Testimony of W. Lyle Borst.)

increased time for completion of the subcontract.'

"Subparagraph No. 2:

"In connection with the provisions of Paragraph 1-05 of the specifications, the subcontractor refused to execute the formal subcontract until the following provisions was inserted on the signature page of the subcontract: 'This contract is signed and executed by The Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove and collect damages [253] by reason of the late delivery of materials notwithstanding the provisions of paragraph 1-05 of the specifications.'

"Subparagraph No. 3:

"There were several agencies involved in the furnishing of the equipment and materials to be installed in the powerhouse. The appellant was not required by his contract to furnish the boilers, nor other related equipment. The appellant was only to install equipment furnished by others. Actually, the Hercules Powder Company, the operator of this plant, procured the necessary equipment and made it available for installation. This particular powerhouse had been started by the operating firm under a subcontract awarded by them. This subcontract was cancelled before complete delivery; however, it had been provided for both the furnishing of the equipment and the installation thereof, and the installation was the cancelled part. Such cancellation did not take place until part of the installa-

(Testimony of W. Lyle Borst.)

tion had been accomplished. All of the equipment except certain pieces hereinafter mentioned was delivered to the project where it was installed or stored. The subcontract provision which provided for the constructor, or others, to furnish materials in subparagraph 5-04 (a) of the [254] specifications which is quoted as follows:

“ ‘5-04. Materials furnished by the constructor. (a). In general, all materials, equipment and machinery which will actually be incorporated into the permanent construction will be furnished by the constructor and/or others. Materials and supplies incidental to the permanent construction, including, but not limited to, cutting oil, wire, fuel for construction equipment, welding bars, cement grout and concrete, scaffolding, forming temporary bracing and blocking, pipe dope and compound, all erection facilities and equipment, etc. will be supplied by the subconstructor without cost to the constructor over and above the subcontract price. Fuel for use in testing operating equipment, and for putting the plant in operation will be supplied by the constructor. Materials furnished by the constructor will be delivered to the subconstructor at points and in the manner specified. Section 7 thereof.’ ”

“Subparagraph No. 4:

“It was a duty of the appellant to make a list of all materials required and to check that list against the materials on the project available for use in the subconstruction work. That duty was

(Testimony of W. Lyle Borst.)

covered by subparagraph 5-04 (b) of the specifications, which is quoted as follows:

“ ‘5-04 (b). Immediately after starting work under [255] the subcontract the subcontractor shall prepare a list of materials including accessories and equipment required, and shall check this list against the materials, accessories and equipment stored in or adjacent to the power house in order that shortages may be immediately determined. Such shortages will then be reported to the constructor for use in obtaining the balance of materials required for the completed work. Such an inventory will be kept current by the subcontractor during the progress of the work, and the subcontractor will be held responsible for advising the constructor of his requirements sufficiently in advance of the time such items will be required to enable procurement without delaying progress.’ The inventory was started as soon as the contractor appeared on the job. While it took a great portion of the subcontract period to complete the inventory because of mass of equipment involved, and because of the manner in which it was stored, it did disclose the fact within a few days after it was started that many water-wall tubes were not present. The operator’s subcontractor had failed to make delivery of such tubes. The subcontractor advised the constructor without delay of the shortages as they were found and the missing items were obtained as fast as possible. At the time that the [256] tube shortage was disclosed the subcontractor put the

(Testimony of W. Lyle Borst.)

constructor on notice that the shortage of tubes would delay completion of the work. Some materials were furnished as much as forty days after the date that they should have been available for orderly and timely completion of the work.

“Subparagraph No. 5:

“The constructor (Cory, Joslin & Macnsons) was not aware until shortly before the contract was awarded that all of the materials necessary to complete the job were not at the project and in addition to requiring the inventory to determine the actual shortages, the subcontract was worded so as to provide that ‘not all’ but only ‘nearly all’ of the materials required for the work were stored at the project. That provision is contained in subparagraph 5-04 (c) of the specifications which is quoted as follows: ‘Subparagraph 5-04 (c). Nearly all of the materials required for the work have been stored in powerhouse No. 1, or in warehouses adjacent thereto. Materials, equipment and machinery which have been stored, and which have been subjected to conditions necessitating reconditioning, refinishing, refacing, cleaning, painting, packing (in valves and pumps) and similar work to properly prepare for installation and [257] operation will be reconditioned, refinished, etc. by the subconstructor as a part of this subcontract, except however, that such reconditioning, refinishing, etc. shall apply only to the defects which have resulted from storage and does not include inherent defects in manufacture or materials. Materials, equipment

(Testimony of W. Lyle Borst.)

and machinery which have been broken or otherwise damaged beyond use or repair during storage, or which have inherent defects in manufacture or materials caused through no fault or negligence of subcontractor will be replaced by the constructor without cost to the subcontractor.'

••Subparagraph No. 6:

••The amount claimed is for actual damages that resulted as an alleged breach of the terms stipulated in paragraph 5-04 (c). The alleged breach of contract is that the amount of materials stored in powerhouse No. 1 and in the warehouse adjacent thereto was not 'nearly all of the materials required for the work.' The appellant maintains that the alleged breach of contract, together with a delay caused by an error made by the manufacturer of the headers for boiler No. 2 resulted in the contract being completed forty days late through no fault of the appellant.

Subparagraph No. 7: [258]

••Information obtained from the Hercules Powder Company has disclosed that the total value of equipment procured for the power house was approximately \$1,145,000.00. Such information also disclosed the number of water-wall tubes required for each boiler to be as follows: 80 sidewall tubes; 50 front wall tubes and 108 back-wall tubes. The tubes for the various walls were of different lengths. The total number required for one boiler is 238, which makes a total of 714 water-wall tubes required for the three boilers. The total number of

(Testimony of W. Lyle Borst.)

other types of tubes required for all three boilers was approximately 4,000. Of all tubes required there was a shortage at the start of 160 side-wall water-wall tubes, and 64 back-wall water-wall tubes. The average cost of one side-wall tube is \$88.00, and the estimated price of one back-wall tube is \$119.15. The total estimated value of the missing tubes is \$14,208.00. In connection with the boiler parts delivered after the subcontract was awarded records show that two water-wall headers used in Boiler No. 3 were delivered so as to reach the job on 26 September 1944. Boiler No. 2 had been partially installed by the subcontractor of the Hercules Powder Company. That partial installation included the setting of the two water-wall [259] headers. After the appellant started work on the instant subcontract he discovered that the water-wall headers that had been installed for boiler No. 2 were not in conformity with the design and could not be used. The appellant removed the misfit headers and replaced them with headers stored on the job and intended for boiler No. 3. Modification No. 1 to the subcontract provided for the work necessary to replace the misfit headers. The undersigned has been unable to ascertain the estimated value of the two replacement headers actually obtained and used in boiler No. 3.

“Subparagraph No. 8:

“In regard to Boiler No. 1, the appellant states that water-wall tubes were required on one August,

(Testimony of W. Lyle Borst.)

1944, in order to permit completion within the one hundred twenty day period, but that tubes were not received on 17 August 1944, or sixteen days late. It is found that a large force of boilermakers were installing tubes in Boiler No. 1 during the aforementioned sixteen day period and that the tubes in question could not have been installed on 1 August had they been received for on that date boiler connection tubes which had to be [260] replaced before placement of the water-wall tubes were not in place. From the tube shortage as described in paragraph seven above, it appears that there were at least enough of each type of various water-wall tubes stored at the site for one boiler.

“Subparagraph No. 9:

“In regard to Boiler No. 2 the contractor states that although water-wall tubes were required on 8 August 1944 they were not received until 20 September 1944, or forty-three days late. The contractor also states that all work on this boiler was delayed eighteen days from 30 September 1944 to 18 October 1944, because the tubes which were three inches in diameter had to be revamped to fit three and one-half inch holes in the headers instead of three inch holes. The three and one-half inch holes were erroneously made by the maker of the headers and were due to no fault of the appellant. The tubes were revamped on the project by the manufacturer. It is found that active construction progress on Boiler No. 2 continued from 8 August until 2 September and that full delay started on 5 Sep-

(Testimony of W. Lyle Borst.)

tember. During the period of from 8 August until 2 September other types of tubes were being installed and water-wall tubes would not have been erected until the boiler tubes were in place. Upon [261] receipt of the tubes on September 20, 1944, work on this boiler was resumed. Progress was made on the other two boilers during the aforementioned delay. On 26 September the error in the water-wall headers for Boiler No. 2 was discovered and work on the installation of those tubes was suspended. The manufacturer revamped the tubes to fit the headers by cutting off end sections of the tubes and rewelding tapered ends in place of those cut off so that the tube ends were three and one-half inches in diameter. This alteration was made so that installation of the revamped tubes was started on 18 October.

“Subparagraph No. 10:

“In regard to Boiler No. 3 the contractor states that although water-wall tubes were required on 15 August 1944 they were not received until 20 September 1944. The contractor also states that although water-wall headers for boiler No. 3 were required not later than 15 August 1944 they were not received until 26 September 1944, or forty-one day late. It is found that no work was done in **regard to placing water-wall tubes and headers** until 26 September.

“Subparagraph No. 11:

“The appellant has the reputation of being a very [262] efficient operator. That firm was regarded

(Testimony of W. Lyle Borst.)

by responsible engineers on this job as having performed the work of completing the power house in very efficient manner. It is found that at the time the tube shortage was discovered the appellant altered its proposed method of operations and paced its work so as to eliminate actual work stoppages. This tends to give the appearances on the progress chart of the job (Exhibit B) that delays in the delivery of tubes and delays caused by misfit headers might not have been the sole reasons why the work was not completed in one hundred twenty days. However, the appellant very probably would have completed the work within one hundred twenty days had all necessary materials been on the job.

“Subparagraph No. 12:

“After the work was completed and in letter dated 21 February 1945 (Exhibit C) the subcontractor made a claim against the constructor in the amount of \$9,323.02 as compensation for the extra costs incurred due to having to work beyond the subcontract completion date through no fault of his own. A revised claim in the amount of \$10,008.70 covering the same items was made in letter dated 20 June 1945 (Exhibit D) to the constructor. This claim of 21 February was denied in letter [263] dated 11 July 1945 (Exhibit E). In letter dated 24 July 1945 (Exhibit F) the letter was submitted to the Contracting Officer in accordance with paragraph 1-11 of the subcontract specifications. This claim was denied in letter dated 31 August (Exhibit G). An appeal of the subconstructor dated 1 Sep-

(Testimony of W. Lyle Borst.)

tember (Exhibit H) was received 10 September. This appeal was not addressed to the Chief of Engineers as required by the aforementioned paragraph 1-11 for which reason the subconstructor was orally requested to submit an appeal addressed to the Chief of Engineers. This revised appeal dated 29 September 1945 was received 3 October 1945."

This is signed, or rather, the name is written on this copy with typewriter "Homer D. Thomas, Major Corps of Engineers, Contracting Officer." There is a certification at the bottom, "A certified true copy, Marion E. Olson, Administrative Assistant."

The Court: I want to ask in what way this is material?

Mr. Watts: In the brief I have filed I have submitted no less than six cases where the Court is bound by findings of fact, but not by conclusions of law, and that these findings of fact in these decisions, I will agree,—

The Court (Interposing:) What is the use of me trying the case if I am bound,— [264]

Mr. Gibson: If the Court please, at this same point, so far as the defendant is concerned, let me say that the cases cited by counsel refer to a situation in which there is a question of penalty against the subcontractor for a violation of his contract, and that in the cases which we will cite in our brief the decisions go to some length in discussing this question.

The Court: I think I will admit the exhibit.

Mr. Gibson: And is that with our objection?

(Testimony of W. Lyle Borst.)

The Court: Yes; and I don't mind saying that this matter is entirely new to me, and I don't want to rule hurriedly on it. I will accept the exhibit, but subject, of course, to your objection, and subject to a motion to strike with the same force and effect as if the motion were made at this time.

(Whereupon Plaintiff's Exhibit 45 for identification, was admitted in evidence.) [265]

Mr. Watts: In connection with the reading of Exhibit No. 44, which I completed last night for the record, I want to call the Court's attention to page three, and clause four, in which the Contracting Officer found that some of the material was missing, and that it was not delivered until forty days late, that is, that it was forty days late being delivered.

Mr. Gibson: I didn't hear that, Mr. Watts.

Mr. Watts: I called the Court's attention to page three and to clause four on that page wherein there was a finding that some of the material was missing and that some of the material was not delivered for forty days, that is, it was forty days late in being delivered, and also [273] I want to call the Court's attention to page five of Exhibit No. 44, and clause nine, wherein it was found that there was an error in the water-wall headers and that this error caused a delay, and I want to call the Court's attention to clause No. 10 on page No. 5 of the exhibit wherein it was found that the delay

(Testimony of W. Lyle Borst.)

in the delivery of water-wall tubes for Boiler No. 3 caused a forty-one day delay.

Mr. Watts: Now, that brings us to the matter of damages.

Q. In this suit what is the basis for your claim for damages?

A. For additional costs which we were forced to go to in completing this work over and above that which we would have been put to had we had the material in proper time.

Q. What are the elements of the difference above the actual cost of performance, and what it would have cost if the material had been on hand and there had been no delay?

A. The additional cost of the supervisory personnel, the additional equipment required for performing the contract.

Q. And what do you mean by that?

A. Well, air compressors, and such things—

Q. (Interposing:) Do you mean the equipment, or the rental of it—the rental of the equipment and additional labor involved from the prescribed labor?

A. The additional labor involved from the prescribed labor, and the office overhead at the home office, and some of the field charges, and for my own time.

Q. Have you made a schedule covering in detail each of the items and component parts of each of these items for introduction in evidence in this case?

A. Yes, sir. [278]

(Testimony of W. Lyle Borst.)

Q. For how many days is your computation under this schedule of damages made?

A. Thirty-nine days.

Q. In what important respects does the present computation of damages differ from the claim for damages that was ultimately submitted to the Chief of Engineers?

Mr. Gibson: We object to that as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness and is an attempt to obviate, or eliminate, the limitation on his own claim which was previously filed.

The Court: I will admit it subject to your objection. If the Court later determines that the plaintiff is bound by the settlement, I will not permit it, and of course I would not permit the plaintiff to increase its claim.

Mr. Gibson: And the Court would probably hold in that event they are not permitted to have damages under the contract?

The Court: That is a matter for later determination. I will admit this at this time, as I stated.

Q. (Mr. Watts, continuing:) Exhibit No. 65, will you please identify that?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 65, for purposes of identification.)

A. That is a computation of the various items—

Q. (Interposing:) Does it comprehend the five elements that you have mentioned?

A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. And the first item, what is that?

A. That is the cost of the equipment—the rental cost.

Q. How much are you claiming for that item?

A. \$2,255.50.

Q. Will you explain to the Court what you mean by this item?

A. This is the various items of equipment which were used in connection with this work, and they were maintained on the project for a thirty-nine day period over and above that which would have been necessary had we been able to complete in the one hundred and twenty day period.

Mr. Scholz: We object to it as it calls for a conclusion of the witness, and it is a conclusion where he states "over and above the time necessary to complete." That is purely a conclusion.

Q. (Mr. Watts, continuing:) In order to obviate that objection, let us put it this way: Tell the Court whether it covers the cost of the rental of equipment for that period between November 10th, which was the date your contract was to have been completed, and December 19th, 1944, the date on which the contract was completed? [280]

Mr. Gibson: We object to that. It is predicated on hearsay. We have here a prepared summary, and the person who prepared it has not been established, and we have nothing to check against.

The Court: Well, it certainly would not be the basis for any damages unless it was shown that this equipment was not being used in any way, that

(Testimony of W. Lyle Borst.)

the equipment was idle on account of the delay. That would be the question. If it was used at all it would be hard for the Court to determine what the value was.

Mr. Gibson: That is a factor overlooked, and that is that he put on as many shifts as possible to work, and that they worked on Sunday and overtime. It certainly is not our fault if they spread this work out and did not get it finished on time.

The Court: I will consider all of your objections.

Q. (Mr. Watts, continuing:) Now, tell the Court whether this computation of the rental on this equipment was for the period of November 10th to December 19th?

Mr. Gibson: I object to it as hearsay and this is not an original record from which we can determine what the rental was.

Mr. Watts: I will introduce the original records.

The Court: It may be admitted subject to the connecting up of it, and of course, subject to your objection. [281]

A. This is a schedule for that rental period.

Q. (Mr. Watts, continuing:) Are you responsible for this schedule for rental, Mr. Borst?

A. It was prepared under my direction.

Q. Do you know that each item listed under Item No. 1 on the schedule, or, rather, on Exhibit No. 65, was at the site and unused during the thirty-nine day period? A. Yes, sir.

Q. On this Exhibit 65, for example, opposite the name of the equipment the first item "Air compres-

(Testimony of W. Lyle Borst.)

sor, one Gardner-Denver two-stage 210 foot piston displacement," you have set opposite that the monthly rate of rent on this equipment?

A. That is right; yes, sir.

Q. And there is shown opposite that the rental covering that piece of equipment for the thirty-nine day period? A. Yes, sir.

Q. In this exhibit No. 65 have you specified each of the pieces of equipment which were rented by you from others, or was owned by you, upon which you are claiming the right to recover during this period of thirty-nine days? A. Yes, sir.

Q. Will you tell the Court, please, one of the sources from which this unit rate per month was chosen?

A. From the O.P.A. rental schedule. [282]

Q. Are any of these rental charges in excess of the maximum price regulation No. 134 of the Office of Price Administration then in force?

Mr. Gibson: We object to that as calling for a conclusion of the witness, and attempting to have him incorporate the regulation of the O.P.A.

The Court: The Court will take judicial notice of the O.P.A. regulations.

Q. (Mr. Watts, continuing:) State whether or not, independent of the O.P.A. regulations of the rental price, whether or not in your opinion the price on this schedule for the rental of each piece is, or is not, reasonable.

A. It is my opinion that they are reasonable.

(Testimony of W. Lyle Borst.)

Q. Tell the Court whether or not the total sum for which you make claim in the amount of \$2,255.50 is, or is not, reasonable for the rental of the equipment designated in Exhibit No. 65 for this thirty-nine day period.

Mr. Gibson: We object to this unless it is conceded that the objection previously made that all of this evidence is incompetent, irrelevant and immaterial to all of the Counts, and the further objection that it is inadmissible on the ground that they have previously filed their claim and signed their receipt in the total sum of \$10,008.70.

The Court: The objection will be noted, and it is conceded [283] here that it goes—your objection goes to all of the question of damages. This will be admitted. [283-A]

Mr. Scholz: May it be stipulated that every statement he makes regarding damages that were objected to before, may be **objected to now, and** that under the contract he is not entitled to damages?

The Court: That will be all covered in the final decision of this case. This case seems to simplify itself into one or two vital points. The first question for the Court to decide is whether the contract is plain and can be declared as it is written. If the Court decides that, then Counts two and three necessarily fall. And the next question is whether if the contract should be interpreted as written, whether there is any consideration for the last

(Testimony of W. Lyle Borst.)

clause. If there was no consideration, then plaintiff's case fails, and if the Court determines that there was a recoverable damage, or damages, on account of these delays the question is whether the damage can be enlarged over and above the claim filed by the plaintiff.

Mr. Gibson: Of course, the Court is carrying in mind the matter of delay, that it alone is not a question of damages. There must be connected with that the matter of negligence.

Mr. Scholz: And even with the clause added to the signature page, we contend there is nothing added to the contract. [284]

The Court: If the Court finds that it is a part of the contract then, of course, it is very plain to the Court.

Mr. Scholz: Not according to our contention.

The Court: This is still in its early stages, I take it. This is only the first witness in this lawsuit.

Mr. Scholz: If your Honor decides that there was consideration for the clause on the signature page, we still contend that it does not give the right to the plaintiff to sue for damages.

The Court: That seems to me a rather unusual statement, but I will consider it. You may go ahead.

A. The question was, Was this a reasonable charge? And in my opinion it is a very reasonable charge.

Q. (Mr. Watts, continuing:) Now, I wish you

(Testimony of W. Lyle Borst.)

would turn to Exhibit 32-1, 32-2, and 32-3. In that exhibit, which is in evidence, will you tell the Court whether or not these expenses include the receipted bills or invoices for each and every item to which you have testified that you want damages for in Exhibit 65, covering this thirty-nine day period of rental?

A. Yes, sir; these invoices cover the charges.

Q. Have these invoices actually been paid by the Power Service Corporation? [285]

A. Yes, sir; they have.

Q. Will you tell the Court whether or not it was necessary for all of these items which are listed under "Item One," on Schedule 65—or, rather, Exhibit 65, to be on the job for this thirty-nine day period?

Mr. Scholz: Now, that calls for a conclusion and we object to it.

The Court: He may answer.

A. Yes, sir; this was all used as is all contracting equipment from day to day for the work, possibly not at one place day after day, in one particular portion, but a portion of work may be performed today, and again the day after that, or the third day, but it was all in there ready for the work.

Q. And was it necessary to keep that equipment on the job to perform this contract?

A. Yes, sir; it was.

Q. Item 2. what does that cover, Mr. Borst?

(Testimony of W. Lyle Borst.)

A. Item 2 is the extra cost of supervisory personnel except Borst.

Q. You are claiming how much for that item?

A. \$8,267.53.

Q. Will you explain that item to the Court, if you please? [286]

A. Yes, sir.

Mr. Gibson. Do I understand that we must make objection to each question now?

The Court: Yes; that is right.

Mr. Gibson: I object, and move to strike this, as incompetent, irrelevant and immaterial, and not payable under the terms of the written contract. It is an attempt to exceed or add to their own established agreement, beyond this \$10,000.00.

The Court: It may be admitted, subject to your objection.

A. May I ask you the question? I don't remember just how this was set up.

Mr. Gibson: Why, don't you just read it, counsel, and save the witness that trouble.

The Court: Just go ahead.

A. These are the names of the supervisory personnel involved, and it gives the base weekly rate, and the exact amount as paid to these men for the exact thirty-nine day period.

Q. (Mr. Watts, continuing:) Will you explain what you mean by "supervisory personnel," and the names of the men appearing under this item?

A. The names are listed; Emil Nelson, general superintendent; [287] O. G. Thornzsen, piping sup-

(Testimony of W. Lyle Borst.)

erintendent; James A. Hobbs, boilermaker superintendent; Ray B. Shaw, purchasing agent; E. W. Ross, chief clerk; James P. Kreitzer, senior clerk; Jack L. Wright, junior clerk; Harvey Precht, general boilermaker foreman; Fred M. Godsoe, general piping foreman; Thra S. Moor, material control; Clifford S. Boyle, general millwright foreman.

Q Were each one of these men a part of your field organization entirely independent of the labor organization as such? A. Yes, sir.

Q. Will you state whether or not these men were required to be on the job during the performance of this contract, during the thirty-nine day period from November 10th to December 19th?

A. They were required for that period of time; yes.

Q. Have you set forth in the schedule in Exhibit No. 65, under Item 2, the exact amount that was actually paid to each of these employees during the thirty-nine day period? A. Yes, sir.

Q. Do you have in the Courtroom and available for inspection of counsel the original payrolls showing that they were actually paid this amount, and do you have the endorsed checks from each of these employees showing the payment of these [288] wages?

A. Yes, sir; we do have.

Mr. Watts: Unless it is required on cross examination, the plaintiff does not introduce the payrolls and checks for the reason that we take the position that they would only unnecessarily en-

(Testimony of W. Lyle Borst.)

cumber the record. However, if there is any question about the authenticity of the exhibit marked 65, we have the checks and the payroll to be marked as an exhibit, if it is desired.

Mr. Gibson: I am not making an objection on that ground. I am not questioning that, Mr. Watts, but I do have my objection in to the exhibit, or schedule, which has been marked as Exhibit 65. I don't object to its being shown by 65, if it was admissible.

The Court: In order to save the objections being repeatedly made, I will say that a general objection as to any testimony as to any claim that enlarges the amount over the claim filed will be deemed to be objected to.

Mr. Gibson: Why can't we have the objection in reference to damages throughout this testimony? It is not payable, under our theory. It would be incompetent, irrelevant and immaterial, and, as I say, under our theory it is not payable under this contract, under any circumstances.

The Court: It is agreeable to the Court that you [289] may have your objection.

Q. (Mr. Watts, continuing:) Will you state whether or not the wages for the supervisory personnel were actually incurred in the amount of \$8,267.53?

A. Wages and payroll taxes and social security; yes, sir; and there was also some expense claims in that.

(Testimony of W. Lyle Borst.)

Q. Will you give us the expense items included in this supervisory personnel item?

A. There was Mr. Ross, Mr. Thorndsen, and Mr. Nelson. We paid Mr. Ross \$186.13; Mr. Thorndsen, \$172.77; and Mr. Nelson \$458.22. That was for the expenses in that period.

Q. (Mr. Watts, continuing:) Under Item No. 2 of this schedule, in addition to the actual payroll on these supervisory men, you have just testified to the fact that you paid them certain expenses. Now, will you tell the Court how those expenses were taken care of?

A. By petty cash vouchers paid in the field.

Q. Did you require each man to show each item of expense that he expended before you reimbursed him?

A. Yes, sir. [290]

Q. Did you issue a check for each bill submitted by the employees?

A. Yes, sir.

Q. Did you have, or do you have, each of the bills to each itemized statement, and each voucher to establish the expenses, that is, for instance, the expense of Emil Nelson in the amount of \$458.22 during that period?

A. Yes, sir.

Q. And do you have the expense vouchers, statements and receipts for each and every employee mentioned on Item No. 2?

A. Yes, sir.

Q. The last item there, amounting to \$286.55 on Item No. 2 of the schedule, what does that represent?

A. That is the payroll taxes and social security payments to the Government.

(Testimony of W. Lyle Borst.)

Q. On the wages of these men enumerated in Item 2? A. Yes, sir.

Q. The total items as listed on supervisory personnel is how much? A. \$8,267.53.

Q. What is the third item of expense?

A. That is an item for additional time for myself on the project, covering the ninety day period, and the expenses [291] for that ninety days.

Q. What are your duties in the Power Service Corporation at Minneapolis?

A. I had the responsibility of getting new business and supervising the business that is obtained.

Q. Is there anyone else in your organization that is charged with the responsibility, or assumes the responsibility or did so during the one hundred and fifty-nine days at the Sunflower Ordnance, that is, with getting new business for your organization?

A. No, sir; that is my responsibility.

Mr. Gibson: I move to strike what his duties are in procuring new business. There certainly is no part of this under the contract.

The Court: The answer is in the record, and it may stand.

Q. Did you have other contracts at the time this was running? A. Yes, sir.

Q. At the present time how many do you have running, Mr. Borst?

A. In the neighborhood of twenty contracts.

Q. Has it been necessary for you to get on the job at the commencement and stay there in the

(Testimony of W. Lyle Borst.)

capacity of more or [292] less a project manager for the full period of performance?

Mr. Scholz: We object to that as incompetent, irrelevant and immaterial, and not within the issues, whether he spent five minutes there, or the whole time. He was under contract to do this work.

The Court: He may answer.

A. On one other occasion we went out and designed and constructed a plant, and I did spend a period of time there.

Q. Is that the only instance?

A. Yes; it is.

Q. What are your ordinary duties with respect to performing a contract such as this, so far as the normal amount of time you spend in the performance of the contract?

Mr. Scholz: We object to that as incompetent, irrelevant and immaterial, and not within the terms of the contract, and certainly not binding on the defendant.

The Court: He may answer.

A. Normally, I would spend the amount of time there necessary to get it under way.

Q. To whom would you turn the responsibility of managing and performing of the contract from then on out?

A. The general superintendent.

Q. And that was whom?

A. That was Emil Nelson. [293]

Q. Now, how much time would it have been necessary, in your opinion, for you to have spent on

(Testimony of W. Lyle Borst.)

this project had not these delays to which you have testified occurred?

Mr. Scholz: We object to that as incompetent, irrelevant and immaterial, and also calls for a conclusion of the witness.

The Court: He may answer.

Mr. Scholz: And may we have the further objection that all damages must be within the contemplation of the parties to the contract. They are alleging a breach, and they could not get any damages unless it flowed from the breach of the contract, outside of special damages which must be distinctly pleaded, and they are bound by that.

The Court: He may answer.

A. About thirty days.

Q. You are submitting a claim under another item for a proportionate part of your salary for the thirty-nine day period? A. Yes, sir.

Q. Out of this one hundred fifty-nine days, tell the Court how many days you spent on the job that you would not have been required to spend had it not been for the delays?

Mr. Scholz: Objected to as incompetent, irrelevant [294] and immaterial, and calling for a conclusion of the witness, and not within the terms of the contract. He was there to perform a definite contract, and this is not admissible.

The Court: He may answer, subject to the objection as to the damage phase.

A. Ninety days.

Q. You would not have been required to spend

(Testimony of W. Lyle Borst.)

that ninety days had the materials been available for the erection of these units?

A. That is right.

Q. What was the actual weekly wage rate,—what were you paid during that period?

A. One hundred dollars a week.

Q. Was that for wages? A. Yes, sir.

Q. How much did that amount to for ninety days? A. \$1,285.71.

Q. What else besides your wages did you receive?

A. Expenses. They were \$1,256.60.

Q. Tell the Court generally what those expenses were.

A. They were hotel expenses, meal expenses, car expenses, driving from Kansas City to the Sunflower Ordnance Project each day, traveling expenses to and from the work, and petty [295] cash.

Q. Were those expenses enumerated in Exhibit No. 65 under item 3,—strike that, please. Let me put it this way, Mr. Borst: Were the expenses enumerated in Exhibit No. 65 under Item No. 3 actually expended by you in the performance of this contract? A. Yes, sir.

Q. During this ninety day period?

A. Yes, sir.

Q. Were you reimbursed for the expenses in this amount? A. Yes, sir.

Q. Do you have in the Courtroom and available for inspection by the Court and counsel an itemized statement for each expense item that you turned in

(Testimony of W. Lyle Borst.)

during this ninety day period, together with the receipted bills and vouchers from the Power Service Corporation in payment of these expense items?

A. Yes, sir.

Q. So that the total amount you are claiming under Item No. 3 for time and expense is how much? A. \$2,542.31.

Q. Was all of this paid to you and received by you from the Power Service Corporation? [296]

A. Yes, sir.

Q. Was it necessary and reasonable as expenses that were incurred by the Power Service Corporation during this ninety day period so far as the wages and expenses were concerned?

A. Yes, sir.

Mr. Scholz: We object to that as calling for a conclusion of the witness as to "necessary expenses."

The Court: The answer is in the record, and it may stand.

Q. (Mr. Watts, continuing:) Now, what is the next item of expenses there?

A. Home office overhead.

Q. How much are you claiming as damages for home office overhead? A. \$6,649.82.

Q. Will you tell the Court what other jobs you had in progress during the thirty-nine day period between November 10th, 1944, and December 19th, 1944.

A. Well, we had a project for the Board of Heating Commissioners of the city of Sleepy Eye, Minnesota.

(Testimony of W. Lyle Borst.)

Q. What else?

A. A project for the Union Pacific railroad company.

Q. Where?

A. Salt Lake City, Utah. [297]

Mr. Scholz: Now, we have an objection to that. Besides our general objection I want the further objection that any other project they might have would certainly not be binding on this defendant, that is, any testimony regarding any other project, and is not any element of damages here.

The Court: Yes; that is true, if it is for that purpose, but I don't know yet what the purpose of this is.

Mr. Watts: The purpose is to allocate to the home office the overhead for this job, that is, the particular portion of the overhead for this job.

The Court: It is your contention that he was looking after this project?

Mr. Watts: No; not exactly. I wouldn't put it that way. I would say the company was performing these various projects at that time.

The Court: I will admit it subject to the objection in the record.

Q. (Mr. Watts, continuing:) What was the total contract price for the Sunflower Ordnance project?

A. \$466,821.07.

Q. What was the contract for the Board of Heating Commissioners at Sleepy Eye?

A. \$15,956.00.

(Testimony of W. Lyle Borst.)

Q. And what was the contract for the Union Pacific at [298] Salt Lake City, Utah?

A. \$80,740.00.

Q. What was the average number of employees between November 10th and December 19th, 1944, at the Sunflower project?

A. The average was eighty-nine employees.

Q. What was the average number of employees at the Sleepy Eye job? A. Four.

Q. What was the average number of employees at Salt Lake City on that contract?

A. Eighteen.

Q. What was the total average number of employees during the thirty-nine day period on the three jobs? A. One hundred eleven.

Q. What was the total contract price of the three jobs, that is, of the jobs at the three sites?

A. \$563,517.07.

Q. What was the annual overhead as shown by the books of your company? A. \$75,316.58.

Q. And what was the average monthly overhead for 1944? A. \$6,276.38.

Q. Have you made an allocation of your monthly overhead [299] of this job, taking into consideration, first, the element of the contract price, the relationship between the Sunflower contract and the total being performed by you at that time, and taking into consideration the relationship of the average number of employees at the Sunflower project to the total number of employees during that thirty-nine day period? A. Yes, sir; I have.

(Testimony of W. Lyle Borst.)

Q. And what percentage of the allocation, using the contract price, as a basis for the allocation? Can you answer that, Mr. Borst?

Mr. Gibson: We object to this. This witness may be an expert as an engineer, but not as an accountant. He is attempting to show what this overhead is. Why didn't they submit a financial statement instead of having this witness testify as an accountant and an engineer, and everything else?

Mr. Scholz: And I want to add to that objection: That this cannot give any reasonable basis. It is too vague, and subject to many different propositions to make it clear enough for this Court to decide that it is the correct amount.

The Court: At this time that objection will be sustained.

Mr. Watts: I will say, your Honor, that we will subsequently offer a deposition of Mr. Gaffney, the treasurer [300] of the plaintiff corporation, in which the items that are being used for a basis of this computation are testified to, and on this basis I offer to prove that by using the contract price as a basis in allocating the overhead the percentage amounts to eighty-three per cent, and that by using the number of employees as a basis for the allocation the percentage which this contract had to bear of the home office overhead is eighty per cent, and then by averaging the two different items, the contract price and the number of employees, which is eighty-three and eighty, dividing that by two would give the average allocation of eighty-one and one-

(Testimony of W. Lyle Borst.)

half per cent, which would have to be applied against this contract if the finding is in favor of the plaintiff, and I will say to your Honor that I have cited cases in my brief in which this specific type of testimony was held to be admissible.

Mr. Gibson: I am not questioning the type of testimony, but I am questioning the source of it at this time.

The Court: Yes; I do not think that he has shown himself qualified to testify, if there is better evidence available at this time.

Q. (Mr. Watts, continuing:) What formula did you apply in reaching the amount of home office overhead which [301] you say is \$6,641.82?

Mr. Scholz: I think that amounts to the same question as the Court has just sustained an objection to.

The Court: The testimony shows that this man is an engineer, the supervisor of a plant, and this question goes to the amount of overhead, which no doubt are all matters of record. It might be that his testimony would be admissible later, but at this time I think he is not qualified, so far as the record shows now.

Q. (Mr. Watts, continuing:) Do you know, Mr. Borst, as a matter of fact that your company had overhead in excess of \$75,000 during the year 1944?

Mr. Gibson: That is objected to as incompetent, irrelevant and immaterial. This man is not an accountant.

Mr. Watts: I will withdraw that question.

(Testimony of W. Lyle Borst.)

Q. Is this Power Service Corporation completely operated under your guidance and supervision in Minneapolis? I will ask you if in the Home Office you are the man who handles all of the business?

A. Yes, sir.

Q. Do you know, independent of any book record, how much the overhead is,—after you refresh your memory, are you willing to testify that your company pays that amount of overhead? [302]

Mr. Gibson: We object to that as incompetent, irrelevant and immaterial, and calling for a conclusion.

Mr. Scholz: And, furthermore, I don't think the witness is qualified.

The Court: Well, we will see if he can answer.

A. We have a tax statement available which gives that information.

Mr. Gibson: Are you offering that tax statement?

Mr. Watts: Yes.

Mr. Scholz: You never prepared that, did you, Mr. Borst?

A. No.

Mr. Scholz: And had nothing to do with preparing it?

A. Not in setting down the figures.

Mr. Watts: I wonder if I may go on with my examination?

The Court: Yes; you may go ahead.

Q. (Mr. Watts, continuing): Was this sworn to by officers of the Power Service Corporation as a

(Testimony of W. Lyle Borst.)

part of its records which it submitted to the United States in respect to income taxes for the year 1944?

Mr. Scholz: We object to that testimony, because the evidence of the officer himself would be the best evidence. To have this witness testify to something that the [303] treasurer of the company could better testify to, is hearsay and would be incompetent.

Mr. Watts: Of course, I cannot get all of this testimony in at once, and I offer this at this time to show the overhead which the company paid.

The Court: The objection will be sustained at this time.

Mr. Watts: The plaintiff offers at this time, and will renew the offer at the proper time later, but now I offer to prove that the formula as it appears in Exhibit No. 5, in arriving at the allocation of the home office overhead was to take the monthly overhead for a month in the year 1944, multiply by eighty-one and one-half per cent, which was the average of contract price and employees, and multiply that by one and three-tenths, which was the time involved here,—one and three-tenths months, or thirty-nine days.

Mr. Gibson: Now, I shall object to counsel testifying in this case.

The Court: I don't think he is testifying. Mr. Gibson. He is making an offer of proof. I understood him to say he was going to make an offer of proof, and would renew the offer later, if it was refused.

(Testimony of W. Lyle Borst.)

Mr. Watts: That is right. We offer to establish [304] at this time that the formula that was used in arriving at the amount of overhead applicable here is that we took the monthly overhead, \$6,276.38. We arrived at that by dividing the total overhead by twelve, multiplying that total by a percentage of eighty-one and one-half, which is a combination of the two percentages, eighty-three and eighty, the price of the contract, and the number of employees, and multiply that by one and three-tenth months, or thirty-nine days, which covers the period here, and arrive at the overhead,—or gives us the overhead of \$6,649.82, out of the total amount of overhead, and that amount is applicable to this contract.

The Court: You may proceed with your proof in accordance with your offer.

Mr. Watts: And do I understand that the Court is excluding No. 66?

The Court: At this time.

Mr. Watts: Very well.

(Whereupon document referred to was marked Plaintiff's Exhibit 66 for purposes of identification.)

Q. (Mr. Watts, continuing:) Now, will you tell the Court how you have arrived at the sum of \$6,649.82, as home office overhead?

Mr. Gibson: I shall object to this on the grounds [305] stated.

The Court: The Court ruled that this witness was not qualified to testify as to the other question, but proof was offered by counsel which I think

(Testimony of W. Lyle Borst.)

makes it competent at this time. I believe I will allow the witness to answer.

A. \$75,316.58 was the annual overhead in 1944, as shown by the plaintiff's books, and that is divided down to arrive at the monthly overhead by dividing that total by twelve, and that gives the figure of \$6,276.38.

Mr. Scholz: Are you reading now from papers that were prepared by you?

A. Yes, I worked this out.

Mr. Scholz: Did you prepare that?

A. It was worked out under my direction.

Mr. Scholz: Did you prepare that?

Mr. Watts: Do you mean, did he make this tabulation sheet?

A. Yes; I set these figures down.

Mr. Scholz: From what records?

A. The over-all figure of the overhead was taken from the accountant's figures and the tax records.

Mr. Scholz: Then they are predicated on the accountant's figures?

A. Yes, sir.

Q. (Mr. Watts, continuing:) What is the figure of the [306] contract price of the Sunflower project?

A. \$466,821.07 on the Sunflower Ordnance project.

Q. What is that based on?

A. The basic contract price plus the three modifications.

(Testimony of W. Lyle Borst.)

Q. Is there evidence here showing that was the contract price? A. Yes, sir.

Q. What was the average number of employees during this period, November 10th to December 19th? A. Eighty-nine.

Q. Do you have the payroll records to establish that these were the actual numbers of employees during that period of time? A. Yes, sir.

Q. Do you know what the contract price of the Sleepy Eye project was? A. Yes, sir.

Q. And what was that? A. \$15,956.00.

Mr. Gibson: We object to this as not the best evidence.

Mr. Watts: We have the contract here with us if you want that? [307]

The Court: If there is an objection I presume that is the way to prove it.

Q. (Mr. Watts, continuing:) Handing you Exhibit No. 68, I will ask you to identify it for the record.

(Whereupon document referred to was marked Plaintiff's Exhibit 68 for purposes of identification.)

A. That is the agreement between the Power Service Corporation and the Board of Heating Commissioners of Sleepy Eye, Minnesota, and it is dated the 26th day of September, 1944.

Q. Showing the contract price of that contract?

A. Yes.

Q. And what is that price? A. \$15,956.00.

(Testimony of W. Lyle Borst.)

Q. Handing you now Exhibit No. 69, will you identify that for the record?

(Whereupon document referred to was marked Plaintiff's Exhibit 69 for purposes of identification.)

A. That is the contract between Union Pacific Railroad Company and the Power Service Corporation, and that is dated the 27th day of April, 1944.

Mr. Watts: We offer in evidence now Exhibits Nos. 68 and 69.

Mr. Scholz: We object to these on the grounds [308] upon which the Court sustained an objection heretofore made, and upon the further grounds that it was not within the contemplation of the parties, and if there was a breach it is too vague and conjectural to be of any assistance to the Court.

The Court: It may be admitted, subject to your general objection.

(Plaintiff's Exhibits 68 and 69, for identification, were received in evidence.)

Q. (Mr. Watts, continuing:) Now, have you taken and added together the total amount of the contract prices on these three jobs in arriving at the figure of \$563,517.07 in order to make a computation of the allocation of home office expense to this particular job? A. Yes, sir.

Q. Does that computation appear under item No. 4 of Exhibit No. 65? A. It does; yes, sir.

Q. Now, Mr. Borst, proceed with the explanation to the Court as to the formula used in arriving at the overhead.

(Testimony of W. Lyle Borst.)

A. The amount of overhead which was obtained from the records of the company in the amount of \$6,276.38 we have used as a basis, and multiplied that by eighty-one and one-half per cent, which represents the portion of the Sunflower allocation against the total overhead of the company, and that, again, we [309] have multiplied by one and three-tenths, which is one and three-tenths months, or thirty-nine days, and that gives us \$6,649.82.

Mr. Scholz: We object to that as it is all predicated,—I will withdraw that,—may I ask the witness a question?

The Court: Yes, you may do that. [310]

Mr. Scholz: Is that predicated on the books and records of the company?

A. Yes, sir.

Mr. Scholz: And upon the accountant's statement?

A. Yes, sir.

Mr. Scholz: We object to it as it is predicated on figures and matters not before the Court, and it is not the best evidence.

Mr. Watts: He has introduced certain contracts and he now goes right on with the computation based on those figures.

The Court: His testimony is in no better condition now, except that these two contracts are in evidence. The objection is sustained.

Mr. Gibson: And the motion to strike is granted?

The Court: Yes, it is granted. He has testified from the books of the company now.

(Testimony of W. Lyle Borst.)

Mr. Watts: I would like him to confine his testimony as to the manner in which it was computed by him, and then I will show the amounts by other witnesses.

The Court: I think you should qualify this witness.

Q. (Mr. Watts, continuing:) You are able to add the total cost of the three contracts together, so far as the computation is concerned? [311]

A. Yes, sir.

Q. And you have before you the amounts that were received by the Power Service Corporation for these three contracts, do you not? A. Yes, sir.

Q. You know independently of the records yourself that these amounts were received by the Power Service Corporation for the contracts performed during this thirty-nine day period?

A. Yes, sir.

Q. You know of your own knowledge that the number of men you testified to were actually employed by the Power Service Corporation during this period of time? A. Yes, sir.

Q. Taking these figures into consideration, have you yourself made this calculation to which you are testifying, Mr. Borst? A. Yes, sir.

Q. Is it your opinion that the proportion of the home office overhead based upon your knowledge of the company's affairs and your position with the company,—is it your opinion that the proportion of eighty-one and one-half percent of the total overhead should be the allocated cost against the Sum-

(Testimony of W. Lyle Borst.)

flower Ordnance contract, and is that a reasonable allocation, in your opinion? [312]

A. Yes, sir.

Mr. Gibson: Now, we object to this. It is the opinion of an engineer as to an accountant's problem.

The Court: I cannot believe that the witness understood your question, Mr. Watts. The witness testified that he knew the cost of this project, and the number of men of his own knowledge, independent of the records.

A. I meant to testify, your Honor, that I knew we had received the amount of \$15,956.00 on the Sleepy Eye contract.

The Court: You knew that independent of the books and records of the company?

A. Yes; I was present at the meeting at which that money was collected. I was there and made settlement in that case. I was at the Council meeting at which we said, "Is the job satisfactory?" and they said, "Yes." And the amount was approved for payment.

Mr. Gibson: When did that meeting take place?

A. In February of the following year.

The Court: If he knows this independent of the records of the company, of course, he may testify. However, it seems almost impossible to the Court.

Q. (Mr. Watts, continuing:) Were you present when this \$15,000 was paid? [313]

A. Yes, sir; I was there when they approved the contract by a minute on the books and a minute that the money would be paid.

(Testimony of W. Lyle Borst.)

Q. Do you know that it was subsequently paid?

A. Yes, sir.

Q. Now, will you tell the Court what you know about the payment of the contract with the Union Pacific Railroad Company as to the time and place?

A. I remember being present in the office when the final payment came in in full on that work.

Mr. Gibson: Will you get the dates, Mr. Watts?

Mr. Watts: Yes; I will do that.

Q. When did that come in?

A. Some time, I think it was in April of the following year.

Q. That would be 1945?

A. Yes, sir; 1945.

Q. Are you willing to testify, Mr. Borst, independent of the records of the company, that is, you will testify yourself independent of any records that the full amount of this contract marked Exhibit 69 has been paid to your corporation?

Mr. Gibson: I have no quarrel with that, Mr. Watts. [314]

Mr. Watts: I may be wrong in my reasoning.

Mr. Gibson: I don't think that he can testify from his own personal knowledge as to the overhead of the office, the home office, for one thing.

Mr. Watts: I think it is a matter of calculation.

The Court: I think we will recess at this time until two o'clock. It is hard for the Court to believe that the witness can testify to matters that he is being interrogated about. However, you may think that over during the recess.

(Testimony of W. Lyle Borst.)

Q. (Mr. Watts, continuing:) Before lunch, Mr. Borst, we were discussing your recollection of the amounts involved in certain contracts, and your recollection of the number of men employed, did you mean to say that you knew the exact sum of each contract, without reference to the contract?

A. No, sir.

Q. Do you remember the men employed on each contract?

A. Not without reference, the exact number of men at any one particular time.

Q. Did you compile this document before you referred to the contract documents and the payrolls, or did you refer to them before you made the exhibit? [315]

Mr. Gibson: Now, we object to this. It presupposes something not in evidence.

The Court: I think that is right. The objection is sustained.

Q. (Mr. Watts, continuing:) In the preparation of document which has been marked as Plaintiff's Exhibit No. 65, did you use information obtained from Exhibit No. 2 which is the original contract in this case, together with the three modifications, in arriving at the amount put down in the Exhibit 65?

(Whereupon document referred to was marked Plaintiff's Exhibit 65 for purposes of identification.)

A. Yes, sir; that is true.

(Testimony of W. Lyle Borst.)

Mr. Gibson: The amount of what, is that you are talking about now?

Mr. Watts: The amount of the contract, or the contract price.

Mr. Gibson: I see.

Q. (Mr. Watts, continuing:) Is that the source of your knowledge? A. Yes; it is.

Q. Could you remember that without referring to the contracts themselves, these three contracts that we have discussed? [316]

A. No, sir; not the exact figures.

Q. Where did you get the figures of \$15,956.00?

A. From the contract.

Q. Was that the Sleepy Eye contract?

A. Yes, sir.

Q. And did you mean to tell the Court that you could remember that without reference to the contract?

A. No, sir; I didn't. I had to refresh my memory at the time I wrote it.

Q. Then after you refreshed your recollection what did you do?

A. I transferred that information to the sheets as we were preparing exhibit No. 65.

Q. Now, Mr. Borst, do the figures that you have put down on Exhibit 65 under Item four correctly reflect the amounts involved in these three contracts? A. Yes, sir; these three do.

Mr. Gibson: The figures speak for themselves. I see numerous figures in these exhibits. Now, he is attempting to get in hearsay testimony. He is

(Testimony of W. Lyle Borst.)

attempting to get in evidence that this witness could not possibly know except by hearsay. He has refreshed his memory from the contracts, and that was not objected to. Now, he says, "These figures," and there are a lot of figures in these contracts, and in these [317] various other exhibits.

The Court: Since counsel is not confining this witness to testimony here, or rather to evidence shown by the documents themselves that have been introduced in evidence, I believe he will be allowed to answer.

Q. (Mr. Watts, continuing:) Will you please refer, Mr. Borst,—

Mr. Watts: I think the Court will take judicial notice that the contract price of the Sunflower Ordinance project amounts to \$466,821.07.

The Court: That is in evidence.

Mr. Watts: And I suppose the Court will take judicial notice that the Sleepy Eye contract involves \$15,956.00?

The Court: And that is also in evidence.

Mr. Watts: And that the Union Pacific contract amounted to \$80,740.00?

The Court: And that also was admitted in evidence, as I recall, or, at any rate, there was evidence in the record without objection, as I recall now, as to the amounts, if the documents themselves were not admitted, but it is my impression now that these documents constituting contracts with these various other people are in evidence.

Mr. Watts: I take it I can prove the facts and

(Testimony of W. Lyle Borst.)

[318] the Court can make computations just as well as the witness can.

The Court: I take it that the witness can testify as to the amounts of the contracts in evidence, as to the fact that was the amount that was paid. I think that is in evidence, however.

Mr. Watts: Very well.

Q. (Mr. Watts, continuing:) The total amount of the three contracts is how much?

Mr. Gibson: That is a matter of computation.

The Court: He can make the computation.

A. This adds up to \$563,517.07.

Q. And did you obtain the information as to the average number of employees on the Sunflower project by exactly the same method as you obtained the figures from these contracts, or this particular contract, by reference to your original records?

A. Yes.

Q. Do you have those records?

A. Yes, sir.

Mr. Watts: Will counsel agree that the average number of employees was eighty-nine?

Mr. Gibson: I think there is in evidence here something about the Power Service Corporation having two [319] subcontractors,—at any rate, I think there were two subcontractors. Now, if you will designate with reference to the average number, whether they were directly employed by the Power Service Corporation?

Mr. Watts: No, I don't believe it takes that into account.

(Testimony of W. Lyle Borst.)

Mr. Gibson: You think it does not show them?

Mr. Watts: I think not.

Q. (Mr. Watts, continuing:) Will you tell the average number of employees without taking into consideration any subcontract?

A. This figure that we have set up here of eighty-nine employees is the average of the Power Service Corporation employees, exclusive of any subcontractors.

Q. What about the average number of the Board of Heating Commissioners Sleepy Eye contract?

A. That is just our own employees.

Q. And how many was that?

A. That was four.

Q. And how many were there under the Union Pacific contract? A. Eighteen.

Q. Your own employees? A. Yes. [320]

Q. And the total during that period was how many?

A. That adds to one hundred eleven.

Q. I want you to develop for the benefit of the Court what you did in that computation,—did you take each of the items and make an allocation of the proportionate amount of the cost, the allocations of the percentage of the Sunflower contract with reference to the total amount of the contracts involved in arriving at that certain percentage of the amount involved? A. I did.

Mr. Gibson: If he can understand that question he is all right.

Mr. Watts: What I am trying to do is to show

(Testimony of W. Lyle Borst.)

that we took the two factors in arriving at a fair percentage, first, is the relation of the sum of the three contracts, and we find that the percentage of the Sunflower job was eighty-three; that is, it amounted to eighty-three per cent of all of the work.

The Court: You might show by this witness whether he does have the qualification to make that computation, and then let him go ahead and make it.

Q. (Mr. Watts, continuing:) Mr. Borst, do you know how to compute the relation between the two figures, that is, I will give you this example: If you have the figure of \$466,821.07, and you want to know what percentage that is [321] of the figure \$563,517.07, do you know how to go about making that computation? A. Yes, sir, I do.

Q. And if you want to determine what percentage eighty-nine bears to one hundred eleven, do you know how to compute that? A. Yes, sir.

Q. And when you have gotten those two percentages do you know how to reach the average percentage between the two? A. Yes, sir.

Q. Will you tell the Court what process you used in arriving at the percentage of overhead that should be allocated to this job for the thirty-nine days?

Mr. Gibson: I assume there is not going to be used any figure given to him by anyone else as the proper overhead charge?

The Court: He may answer this question.

A. I made the computation here of the percent-

(Testimony of W. Lyle Borst.)

age of the cost, or, rather, the cost of the contract price of the Sunflower Ordnance project as to the total of the work we had that year at the time, and expressing it percentagewise it is a simple matter of dividing the cost, or the contract price, of the Sunflower Project, which is \$466,821.07, dividing that by the total of the contract price of the three [322] contracts, which is \$563,517.07, which gives you the figure eighty-three, or eighty-three per cent.

Q. Now, go through the same procedure on the number employed, that is, the average number employed on these projects.

A. The average number on the Sunflower Project was eighty-nine, which, divided by one hundred eleven, being the total of all of the employees on the three jobs, gives the figure of eighty, or divided by one hundred, gives eighty per cent, and these two percentages, eighty-three per cent on the price, and eighty per cent on the number of employees, divided by two gives the figure of eight-one and one-half, which is the average percentage.

Q. Now, then, with that in mind,—Strike that, please, Mr. Reporter. You hire all of the employees in the home office of your company?

A. Yes, sir.

Q. And you hire all the employees in the field, that is the key employees?

A. Yes, sir, the key employees, I do.

Q. Are you responsible for getting the contracts? Do you get all the contracts for the company?

A. That is my work.

(Testimony of W. Lyle Borst.)

Q. Do you draw the specifications, or supervise the [323] preparation of the specifications where it is necessary in the performance of a contract?

A. Yes, sir.

Q. Are you charged with the responsibility of performing the contract? A. Yes, sir.

Q. And how about collecting the amount of money due?

A. Well, in this way it is under my supervision: The bills are prepared in the accounting department and go over my desk for checking, and if the collection is not made then it is my duty to follow through and see why it is not received.

Q. Will you tell the Court whether or not in your opinion, Mr. Borst, the percentage of eighty-one and one-half is a fair allocation of the overhead of this job to your overhead in the home office, whatever that might be?

Mr. Scholz: That is objected to as incompetent, **irrelevant and immaterial**, and placing upon this man the responsibility of making an arbitrary determination of accounting problems, and certainly this is not an engineering problem.

The Court: He has testified now as to the percentages and how they are arrived at. He is the superintendent and has been in this work for some time, as I understand it. However, Mr. Watts, you may show what his [324] experience is in making these allocations.

Q. (Mr. Watts, continuing:) Will you tell the Court what type of allocation you made, percentage

(Testimony of W. Lyle Borst.)

wise, in the matter of these contracts, using one of these schedules, for instance, use schedule 53?

Mr. Gibson: I understood the Court to ask about his experience and qualifications?

The Court: That is right. That was my intention, and I thought that is what I did. If he is permitted to show that this is reasonable, he should also show his qualifications to give the opinion.

Mr. Watts: I beg the Court's pardon.

Q. (Mr. Watts, continuing:) Mr. Borst, how long have you been in this business?

A. Since 1925.

Q. Where were you educated?

A. At the University of Minnesota, College of Engineering.

Q. What has been your occupation with this company during this twenty-five years, or the twenty-three year period that I understand you have been with them?

Mr. Gibson: In addition to his other experience, he has said that he does practically everything in connection with the company except the janitor work. [325]

The Court: He may answer.

A. I was with one other company since 1925 for a period of eight years, and then came with the Power Service Corporation as Chief Engineer, and in that capacity I had rather an unique situation,—it might seem rather unusual, but I will explain what my situation is. The Power Service Corporation had been organized before I came, as a sub-

(Testimony of W. Lyle Borst.)

sidiary to the Fegels Construction Company. They had done very little work, but I felt that it would be a very good company to be connected with. I felt that there was a definite advantage even though they had very little work along this line, and I told them, and they said, "What would you do?" and I said I would try to take over this plant work, and work of this kind, managing it, which was foreign to their heavy construction work, and I came in and was given that opportunity by them. I am not an officer of the company, although I do have the burden of operating it. I am given wide authority, much more general in scope than might be taken from my title of Chief Engineer. It is an unusual situation, but, as I say, I do have the burden of carrying on this company entirely.

Q. Are you entirely responsible for procuring all of the business and producing profit and maintaining the business of this company?

A. Yes, sir; I know that if I don't make it that they [326] will just say "I am sorry, but we will carry on our own business."

Q. And in a position such as yours is it necessary to figure the costs on each contract?

A. That is my burden, absolutely.

Q. Do you take into consideration in figuring every contract certain items for overhead?

A. Yes, sir.

Q. And do you allocate that to every job, that is, a certain amount of the overhead, to arrive at

(Testimony of W. Lyle Borst.)

a figure at which your corporation can make a profit? A. Yes, sir.

Q. And have you done that in every case over the twenty-three year period in figuring these contracts?

A. Yes, sir; both for this and the other company.

Q. And is it you, Mr. Borst, that is responsible for the bids submitted by the Power Service Corporation? A. Yes, sir.

Q. And were you solely responsible for the figures submitted on this job? A. Yes, sir.

Q. And did you figure a certain amount of overhead that should be applied to this contract before you could arrive at any profit? [327]

A. Yes, sir; I did.

Q. In making this calculation will you tell the Court ordinarily the method that you follow in allocating the overhead to any given job?

The Court: I think he has already testified to that, Mr. Watts.

Mr. Watts: Very well, your Honor.

Q. (Mr. Watts, continuing:) Now, Mr. Borst, do you consider with the experience you have had that eighty-one and one-half per cent is a reasonable allocation of the overhead to this particular contract for that thirty-nine day period, taking into consideration these factors to which you have testified?

Mr. Gibson: We object to that as incompetent, irrelevant and immaterial. The witness is not qualified as an expert. What he may consider as the

(Testimony of W. Lyle Borst.)

amount of overhead and profit his company should get is not the criterion of good accounting methods. I might figure what a company should make and then I would fix that as reasonable, but I don't think that would be the criterion. Counsel can ask what he did and what he allocated, and I have no objection other than the general objection to that, but I don't think that he should be permitted to testify what is fair.

The Court: I will permit him to answer, and then [328] give it such weight as I shall determine it is entitled to.

A. I feel that eighty-one and one-half per cent is a fair representation of the overhead as reflected in the cost of that part of the work.

Q. Now, Mr. Borst, what is the fifth item upon which you base your total item of damages?

A. That is the item that is due to increased labor costs due to the loss of efficiency.

Q. You have given the Court the loss that your company suffered in excess labor costs so far as the supervisory cost is concerned? A. Yes, sir.

Q. Now is this solely to the cost of labor in performing this contract? A. Yes, it is.

Q. Aside from what you have given the Court? A. Yes.

Q. You have here all of the payrolls on this job?

A. Yes, sir.

Q. You have the payrolls, not only for the period of July 13th to December 19th, but also for

(Testimony of W. Lyle Borst.)

the amount of wages from July 13th to November 10th?

A. Yes, sir; I have that figure developed in my notes there. [329]

Q. I wish you would refer to your payrolls and your notes in connection with your examination of them and give the Court, please, the total amount of the labor payroll alone, exclusive of the supervisory personnel for the entire job from July 13th to December 19th, 1944.

A. I don't have that break-down exclusive of the supervisory personnel,—no; I don't have that set out.

Q. Well, including the supervisory personnel?

A. That would be to what date?

Q. To the end of the contract.

A. December 19th, 1944?

Q. Yes. A. That would be \$227,418.27.

Q. What was the payroll at the end of the period,—at the date of November 10th, 1944 for both supervisory and labor? A. \$181,467.26.

Q. And the difference between those two figures is how much? A. \$45,951.01.

Q. Are you asking for that recovery, or rather, for the recovery of that difference in this case?

A. No, sir.

Q. How much are you asking the Court for?

A. Under this item, you mean?

Q. Yes. A. \$14,611.72.

Q. Now, Mr. Borst, what does that item of

(Testimony of W. Lyle Borst.)

\$14,611.72,—just in plain words what does it represent,—it is the difference between what?

A. It is the difference between the cost of the work as it obtained,—

Q. (Interposing:) Let me ask you this, Mr. Borst: The actual cost of the work which involved only the erection of boilers No. 1, No. 2 and No. 3, which were repeat processes?

A. The actual cost was \$131,505.47.

Q. From what source did you obtain that computation?

Mr. Watts: I show you a computation now which is Exhibit No. 66.

A. Might I explain that in carrying out this work we kept a daily record of the work of individual workmen, and all that was compiled separately from the accounting office in the home office.

Q. Under whose supervision?

A. Under my supervision at the site, so I was able to determine exactly the amount of the payroll, that is, the amount of money that was expended on repeat operations, and the portion of the work on which the repeat idea might have [331] been expected to obtain.

Q. And have you gone through the records and made this exhibit No. 66? A. Yes, sir.

Q. And have you separated the labor items from the general operation that involves this repeat operation, or these repeat operations in boilers numbered one, two and three? A. Yes.

(Testimony of W. Lyle Borst.)

Q. And is that correctly set forth in exhibit No. 66? A. It is.

Q. Did you prepare Exhibit No. 66 yourself?

A. Yes, sir.

Mr. Watts: We offer Plaintiff's Exhibit 66 in evidence at this time.

Mr. Gibson: I assume it is simply a copy of what he has stated on the stand?

Mr. Watts: No; it is not.

Mr. Gibson: Is this the men out on this job, scattered about the job, or who were working on the erection of the boilers?

Mr. Watts: Only men who worked on the operation of, or, rather, the erection of the boilers.

Mr. Gibson: The erection of the boilers only?

Mr. Watts: Yes.

Q. (Mr. Watts, continuing:) I wish you would make it clear, Mr. Borst, does the labor that you are now talking about cover only a portion of the total labor, or is it the total number of employees employed there by you?

A. That is only a portion. There were other workers in addition to the boiler, piping, and headers, which did not occur in multiple.

Q. Out of this total sum of \$227,418.27, being the total payroll, only \$131,505.47 is properly allocable to your repeat operations?

A. That is right.

Q. Will you tell the Court generally what laborers this \$131,505.47 covers?

A. In the main, it is boilermakers' work.

(Testimony of W. Lyle Borst.)

The Court: The exhibit may be admitted.

(Whereupon Plaintiff's Exhibit 66, for identification, was received in evidence.)

Q. (Mr. Watts, continuing:) Now, in figuring this contract and the price that you had bid on it, will you tell the Court what you took into consideration with respect to the manner in which you would work to erect these three units?

A. This chart has not been prepared with this in mind, [333] but in connection with the operation incident to number one boiler we have shown the normal length of time, or unit required, to be one hundred,—that is up to the red mark here (indicating), which includes one hundred per cent of the work. In that work of putting up this boiler there would be several, independent and separate and distinct operations, such as the erection of the drums, the steel jackets and other phases of the work, that would all be repeated on number two and number three boilers. They would be successive operations under normal procedure. There would be three jobs to be erected in a row, and we would have developed a crew to do a certain phase of that work, we will say, putting up water-wall headers. That crew would complete that particular operation in the first boiler, move on to the second and do again, and move onto the third, and repeat it there, and in a similar manner we would develop a crew for putting in a certain set of tubes. They would do it on the first boiler, move on to the second boiler, and then to the third until the work was all done.

(Testimony of W. Lyle Borst.)

With the successful development of such crews, they would work on all three of the boilers. It would be sort of an assembly line, except that the men would move from boiler to boiler in this case, but with the same idea in mind as an assembly line operation. This represents what we actually [334] experienced, the total length of this bar here, and the proportionate amount of money spent on boiler number one to do all of that erection. We felt that it should have been done, and could have been done in five per cent less than that, or one hundred units, if we had not experienced delays in connection with the operation.

Q. Will you tell the Court what delays you encountered which caused you to take this five per cent more cost than would have been normally the cost of doing the work, if the delays had not occurred?

Mr. Gibson: Now, we object to this. It presupposes a normal amount which has not been shown.

Mr. Scholz: We object to the use of the term or phrase "normal cost." I presume that he was assuming a condition when all of the material was there, and nothing at all would interrupt them in their procedure.

The Court: I will permit him to answer, and the answer so far may stand in the record.

Q. (Mr. Watts, continuing:) What are the delays,—what happened when a delay took place when there was a loss of five per cent, or when it took

(Testimony of W. Lyle Borst.)

one hundred and five units to do the work instead of one hundred units?

A. Well, the work would get to a certain degree of completion, and then the operation would have to be stopped. [335] We might have installed two or three rows of water-wall tubes at one point, and then for the lack of additional tubes we would have to stop. This crew would have to be disbanded then, and introduced into, or taken up by other crews, and there might have been a block and tackle set up to pull this stuff into the air for erection, and that would have to be taken down, and cables would go back to the power hoist to use the hoist, because it had an operator that was using it almost continuously, and there would be delays incident to not being able to go forward with the work for several reasons, and those are the things to which we attributed the five per cent additional, or one hundred and five per cent, or units, actually used.

Q. How much time would be actually lost by a crew when you reached a situation where you had no material to go forward?

A. Well, you could easily use a half day's time in getting organized on another piece of work.

Q. Would you continue to pay these men for that one-half day, from the time they finished one phase of the work until they started on another phase?

A. Yes, sir; we would.

Q. Did you actually pay them?

A. Yes, sir; we did. [336]

(Testimony of W. Lyle Borst.)

Q. How often, or how many times would there be when you had this stoppage of this work?

Mr. Gibson: We object to that. There would be certain stoppages that would be considered at the time of the bid.

The Court: I will permit him to answer.

A. There would be a couple of times in the period of these boilers.

Q. When these stoppages would occur what would be the first step for the foreman to take when he got to the point where the tubes, we will say, were not there? What would the foreman do?

A. He would have to make a survey of the progress and come back to the general foreman and say, "I am caught up. What will I do next now?" and then they would get directions from the tube supervisor.

Q. Who would he come to for his directions as to what next to do?

A. Well, the gang foreman to the boiler foreman; the boiler foreman to the superintendent, and then the superintendent would work the thing out.

Q. And that was who?

A. That was Mr. Hobbs.

Q. And what did Mr. Hobbs have to do then?

A. Well, he was—

Q. (Interposing:) You have the testimony of Mr. Hobbs here in the form of a deposition, do you not?

A. Yes, sir.

Q. What is your judgment, Mr. Borst, as to the

(Testimony of W. Lyle Borst.)

amount of loss in terms of percentage that you suffered on the first operation alone?

Mr. Gibson: I object to that as a conclusion of the witness, and it is dependent on circumstances and variable conditions of operation within the contemplation of the contract, and it is no indication of delay which would be chargeable to a breach. It is the usual hazard of a contract.

The Court: I think possibly you are right, but I will permit it to go in subject to the objection, and to the weight to be given to it later.

A. The five per cent we allowed, in my judgment, was the proportionate amount of time lost in delays.

Q. (Mr. Watts, continuing:) And what, translated into terms of dollars, what did that mean to you?

A. That would represent three or four thousand dollars.

Q. The point I want is whether that five per cent in addition cost your company additional money?

A. Yes; it represents the over-all loss. [338]

Q. State whether or not the first operation, in your opinion, cost one hundred and five per cent of what it normally would have cost your company?

A. That is correct.

Q. Will you state what your opinion is as to what the actual cost was, and what the normal cost should be, on the second operation, and give your reasons for it?

(Testimony of W. Lyle Borst.)

A. On the second operation we had expected to pick up on that from the value of our experience on the first operation. We thought that we could do the work in ninety or less units by virtue of the fact that it was a repeated operation phase.

Q. Why?

A. Because it would be a reasonable determination that the men would accomplish this by virtue of not having to stand around and review the blue prints, for one thing, and another thing, they would be familiar with the material and the exact way to get it into the air to be placed properly, and they would take advantage of every opportunity, and in this way we should have accomplished it in ninety units.

Q. Now, let us assume that the first operation would take one hundred hours, Mr. Borst, what would the second operation normally take, if there had been no delays?

A. It would normally have taken ninety hours.

Mr. Scholz: That is a supposition on your part?

A. No.

Q. (Mr. Watts, continuing:) That is your opinion, isn't it? A. That is my opinion.

Q. If you could normally have done it in ninety hours, or ninety units of time,—just tell the Court how many units it took in this case to erect the number two boiler.

Mr. Scholz: That calls for a conclusion. He would have to go back to show what men were there, what the stoppage was, and what plans he

(Testimony of W. Lyle Borst.)

had for this work, and where the men went, and when they came back.

The Court: I will admit it, subject to having it connected up. He may answer.

A. In this instance we did not obtain any value from the first operation, that is, we didn't get any advantage between the one hundred and the ninety units. There was no sequence of operation to follow through to obtain that familiarity with the operation that the men required in order to gain the necessary efficiency to do the work in the ninety units.

Q. (Mr. Watts, continuing:) What would happen between [340] this boiler number one and boiler number two with respect to the crews themselves, we will say the crew that performed the operation on the first unit, what would happen to that?

A. Well, this crew, once they had completed this job and were not able to move on by reason of scarcity of materials, they would be broken down and some would go into another crew.

Q. To do what?

A. Well, to do some other work, maybe just one or two of the men would go into another crew, so that the first crew would not be kept in unity for the next phase of the work.

Q. Then what crew was used on the next portion?

A. A crew entirely built up again. There may not be any of the original men in that second crew.

(Testimony of W. Lyle Borst.)

There may have been, and there may not have been, I can't answer as to that.

Q. How many crews were employed on this whole job, that is, during the whole job?

Mr. Gibson: We object to that. He said, "they may, or may not be, the same men." He should have a complete schedule, if that is important here.

The Court: I will permit him to answer, just for what it is worth. I will determine that later.

A. After the matter of being unable to gain any advantage of this repeated operation, we of course had to carry this chart so it would be in conformity with the amount of work that [341] was actually obtained, and some sort of delay had obtained on this first operation that gave rise to the first five per cent loss, and that, in addition to the fact that the second operation should have been accomplished in ninety units, made a total of fifteen per cent loss in connection with the second operation.

Q. Under normal operations you would have completed in how many units of time?

A. You mean the second operation, or boiler number two?

Q. Yes. You would have completed that in how many units of time? A. Ninety.

Q. How many did you actually consume in the second unit? A. One hundred and five.

Q. So that there was a loss of what in percentage? A. Fifteen per cent.

Q. Now then, Mr. Borst, what about the third?

(Testimony of W. Lyle Borst.)

A. Well, we would have picked up the same amount there if we had the same crew going from boiler to boiler.

Q. Assuming what?

A. Assuming that they could move forward from one operation to the same operation that was to be repeated.

Q. You could have completed that in how many units of time? [342]

A. In eighty-seven and one-half units.

Q. How many did it actually take you to complete the third boiler?

A. One hundred and five units.

Q. The same as the other two?

A. Yes, sir.

Q. Why did it take one hundred and five to complete on the third boiler?

A. The same delays did obtain. The loss of the assembly line principle obtained on this operation as it had before, and we were unable to use the same crew which would have gained efficiency by reason of previous operations in that amount.

Q. Did any of this estimated loss of efficiency include any stoppage by reason of simple matters or small matters—let me put it this way: To what have you confined your estimated loss in operation in making this schedule, or table, of loss of efficiency?

A. Entirely to the matter of water-wall tubes and water-wall headers for the boilers, and also to the matter of the drum which was there in error,

(Testimony of W. Lyle Borst.)

and was not our error.

Q. Did the shortages represented by any of these requisitions and any invoices making up Exhibit No. 20 running from No. 1 to No. 84, outside of the shortage of tubes and headers [343] contribute in any way to the loss of efficiency or delay, or do you know?

A. Yes; I know they did not, because that material came in readily.

Q. When did it come in?

A. Well, it came in within the time required. We didn't need to wait for that material.

Q. Did the shortage represented by the 84 requisitions, outside of the missing tubes and headers, in any way contribute to the delay in the construction of these units?

A. No; I am sure it did not.

Q. And—

The Court: Did you have a large turn-over in help on this job? A. No.

The Court: What prevented you from using the same crew on operations number two and three that you used on number one?

A. Well, I can explain it this way to your Honor: Once you get a crew developed and the men going forward on any operation, and then assume that they will finish that operation or that thing they are doing, even though there might have been a complete operation, and there was not a repeat operation ready at the time, then these men

(Testimony of W. Lyle Borst.)

are taken to [344] another crew, and when the work on the second operation is ready, even though one man might be very desirable to be used on that operation, he is tied in here with the second crew and it is hard to bring him back.

The Court: Even with the delay, if you could have transferred back the same crews you would have the same ninety unit efficiency that you have set up on this map, or chart?

A. Yes, sir.

The Court: And if you could have used the same men on operation number three that you used on operations one and two, you would have obtained the eighty-seven and one-half per cent efficiency there?

A. Yes, sir.

Q. (Mr. Watts, continuing:) That would have been on these repeat operations, would it, Mr. Borst?

A. Yes, sir.

Q. And what would the effect of withdrawing these men that were tied up on another job, or another phase of the contract, have on that other phase to which they had been sent?

A. That would have broken that crew, or unit of workmen up.

Q. Was it your purpose to leave this man you mentioned working on something else—was that in your opinion more [345] efficient than bringing him back to this crew on the second operation?

A. Yes, sir.

Q. Throughout the performance of this contract

(Testimony of W. Lyle Borst.)

was it necessary from time to time to make adjustments of that kind in order to operate as efficiently as possible?

A. I am not sure that I understand the question?

Q. Well, you paced the job from time to time?

A. Yes, sir.

Q. What did you mean by that?

A. Yes, sir; we were able to tell, and able to see, that it had reached a certain stage of progress—for example, it was true between this boiler number two and boiler number three, in fact, it was true all the way along, so far as that goes. We had certain materials that were short here, and we knew that we would get it in two or three weeks, by virtue of promises that had been made, and we would be able to take up the work at that time, if we did certain other work, so in the intervening time we had a portion of the work that could be accomplished, and to do this we used the men in steady day to day progress to be reasonably done with the intervening portion of the work so that we could then go on with the work of putting in the material that was short when it did come. [346]

Q. In order to do this, does the schedule introduced here—I mean the progress schedule introduced—does it show that in many operations you did, in fact, start the work several weeks, or several days, before the work would normally be started?

A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. Just give the Court one example of that, Mr. Borst, and take Exhibit No. 57.

Mr. Watts: Before I ask Mr. Borst to complete his answer in respect to Exhibit No. 57, let me say that Mr. Gibson has asked me a question about this during the recess that indicates that we perhaps have not drawn it as clearly as we could, and I want Mr. Borst to explain the difference between the first and second operations, if I may?

The Court: Yes, go ahead.

Q. (Mr. Watts, continuing:) Mr. Borst, what part of this diagram which appears on page seven of exhibit No. 75, and is reflected in this large scale, are you concerned with in describing the second operation? [347]

A. The second operation is here (indicating), and we are concerned with the second, or the lower, bar. This first had been for comparison only, but it is the lower portion that we are concerned with now.

Q. And how about the third operation?

A. The bottom bar is the only bar that operates as to the third operation.

Q. And the other two, as you said of the second operation in connection with this, is for comparison only?

A. Yes, sir; these two are for comparison (indicating).

Q. Now, will you point out to the Court one, or a number of, instances in which you started opera-

(Testimony of W. Lyle Borst.)

tions ahead of the normal schedule on erection of the three boilers? Show how it is indicated on Exhibit No. 57.

A. This deals with boiler number one. Directing your attention down to this item here, the pulverizer, exhaust, burners and soot blowers, that normally would have commenced on the first of August, but we commenced it back here on the 27th of July. This item, boiler exterior casing, we would have started that on the 18th of September, according to schedule, but we put it in operation on the fifth of September.

Q. How many days ahead of schedule was that?

A. Thirteen days, and this situation on the forced draft fans and drives, that we would have started on the first of [348] September, but the schedule shows we started that on the 7th of August, and, as I say, it would have normally started on the first of September.

Q. You started this work earlier, ahead of schedule, because you didn't have any tubes?

A. That is right.

The Court: I think I understand it thoroughly now. Now then, you may proceed with your explanation as to what the extra cost in percentage on the three operations was.

A. I don't think I gave the operational result on the third operation, and that resulted in a seventeen and one-half per cent excess cost over the normal cost.

Q. (Mr. Watts, continuing:) Over the normal

(Testimony of W. Lyle Borst.)

cost?

A. Yes, sir; on that particular job.

Q. In arriving at the estimate of the loss for the excess cost of the labor, how do you arrive at the figure that you have there? What do you do to arrive at that?

A. We average these three (indicating).

Q. That is the five per cent, the fifteen per cent and the seventeen and a half per cent, by adding and dividing, is that the way you arrive at it?

A. Yes, sir; we add the five, the fifteen and the seventeen and a half, and then we divide by three, and get [349] the twelve and a half per cent over-all loss, or excess cost.

Q. What does that mean in terms of dollars to the plaintiff?

A. That represents \$14,611.72, this figure here (indicating).

Q. Then if the loss was twelve and one-half per cent. that is, over the normal cost of the job, what percentage, strike that, please. If the average loss in efficiency was twelve and a half percent, what, in percentage, was the actual cost of the entire operation?

A. One hundred twelve and one-half per cent.

Mr. Gibson: He is now reading from that map, or chart?

Mr. Watts: Yes; he is.

Q. And, Mr. Borst, is that your best judgment of the percentage cost of this operation?

(Testimony of W. Lyle Borst.)

A. Yes, sir.

Q. What was the cost in dollars and cents to the Power Service Corporation?

A. \$131,505.47.

Q. And that is shown on Exhibit No. 66?

A. Yes, sir; that is right.

Q. How did you arrive at the normal labor costs of the [350] operation?

A. I used one hundred per cent instead of the one hundred twelve and one-half per cent, and that put us back to \$116,893.75.

Q. And what, in your opinion, would have been the normal cost of operation had you not been delayed because of non-delivery or late delivery of these water tubes and headers?

A. \$116,893.75.

Q. The difference between those two figures represents what?

A. \$14,611.72.

Q. And what is the item of \$14,611.72?

A. That is item No. 5 in the claim for damages.

Q. And what is your opinion as to whether or not that is a reasonable estimate of the difference between the actual cost of this job and what would have been the cost if you had not had any of these delays?

Mr. Gibson: We object to that as calling for a conclusion, and being purely an arbitrary estimate. It is a figure based on a consideration that is variable under any number of circumstances. I object to the testimony as to the reasonableness of it. He is not qualified to give such testimony. [351]

(Testimony of W. Lyle Borst.)

The Court: He may answer, subject to your objection, and it may be stricken if the Court determines that it should be.

A. I feel that it is an equitable figure.

Q. In making this computation for the operation, are there certain other elements of damages which are not now being offered in support of this total claim where your company suffered certain losses in the performance of the contract?

Mr. Scholz: You have other testimony that you are not offering, and other damages that you are not asking for?

Mr. Watts: Yes.

Mr. Scholz: Then this is immaterial, entirely immaterial.

The Court: Yes; it is immaterial.

Q. What is the total amount of your claim according to exhibit No. 65?

A. Will you please repeat that question?

Q. What is the total amount of your claim according to exhibit No. 65?

A. \$34,326.88.

Q. Now, as a resume of this, will you give the amount opposite each item as shown in this exhibit?

A. The first is the extra cost of equipment rental, \$2,255.50—

Mr. Scholz (Interposing:) That is just repeating what he has said before. It is objected to as repetition, if the Court please.

The Court: Yes, I think it is all in evidence here.

(Testimony of W. Lyle Borst.)

Mr. Watts: I think it is, too. Very well. And you may take the witness—but first, I offer in evidence Exhibit No. 65.

Mr. Scholz: I think our objection is in the record.

The Court: Yes, I believe it is. The exhibit will be admitted, however.

Mr. Gibson: I doubt very much that we do have an objection in the record as to this exhibit, and I want to object to the part of the subject matter that has been explained, and coming back to the percentages of the overhead, with no supporting data in the testimony offered by the witness, Mr. Borst, who is not qualified, and whose testimony was rejected on the question of overhead at the home office. I object to that as incompetent, irrelevant and immaterial, and it is based on hearsay without the proper foundation. This is in addition to the present objection which is, [353] perhaps, in the record, as to Count one, and as to any testimony going to show that it is in excess of the ten thousand dollar claim.

Mr. Watts: I promised to produce the testimony of the treasurer of the company as to the overhead, and I shall do that.

The Court: It is admitted with that understanding.

(Whereupon Plaintiff's Exhibit 65, for identification, was admitted in evidence.)

EXCERPTS FROM DEPOSITION OF
DELBERT C. SMITH

Question No. 7: Describe in some detail what you did to put that part of the equipment which had not been installed in Power House No. 1 "in stand-by" condition, first, with respect to the treatment or conditioning of the equipment, and, second, with respect to inventorying the same.

Mr. Scholz: We object to that on the ground that it is incompetent, irrelevant and immaterial, and also not binding upon this defendant. It states in part, "What did you do to put that part of the equipment which had not been installed in Power House No. 1 in stand-by condition, with respect to treatment and the inventorying of the same." Now, that was on or about June 29, 1943, which was over a year before this contract, and we have the further objection that the contract states that the equipment was in stand-by condition and provided for the [356] inventorying of the same, and put the plaintiff on notice that he is to check the same before submitting a bid.

The Court: I don't see how it could be competent here. It certainly could not be binding on the defendant, and as counsel said, it is a year ahead of the contract. I think it is immaterial.

Question No. 8: When was this inventory taken?

Mr. Gibson: Now, I want to make the same objection because the inventory was taken preceeding this contract. It was considerably preceding the time of the contract, and has no bearing on this,

(Deposition of Delbert C. Smith.)

and it is incompetent, irrelevant and immaterial.

The Court: I cannot see how it is material.

Mr. Watts: I want to show, if your Honor please, that this man Smith had knowledge of the fact that certain boiler tubes and water-wall headers were missing when the specifications were written, and that he prepared the specifications.

The Court: But your action here is against this defendant.

Mr. Watts: But the specifications which were offered to us by the defendant were prepared by this man, and we will prove it.

Mr. Gibson: I want to object to that statement.

The Court: I cannot see how this is material, but possibly we are encumbering our record more than we would by letting it in. However, I will sustain the objection to this.

Question No. 9: Did you determine at that time whether or not there were any shortages of materials required to complete the installation of the boilers in Power House No. 1?

Mr. Gibson: We object to that as being incompetent, irrelevant and immaterial, and it is entirely too remote from the formation of this contract.

The Court: Do you have testimony to connect it up with this defendant?

Mr. Watts: Yes, I have the specifications which this man wrote, and which were subsequently modified by the A-E-M and submitted to my client to bid upon, so that, in effect, the defendant Mr. Joslin has adopted those specifications.

(Deposition of Delbert C. Smith.)

The Court: But these were prior to the contract.

Mr. Watts: But that has a bearing on this question.

The Court: I will permit him to answer, subject to the objection. [358]

Question No. 14: State briefly what you did, and what, within your personal knowledge, was done with reference to preparing these specifications to be used by prospective bidders?

Mr. Gibson: We object to that as incompetent, irrelevant and immaterial. The specifications speak for themselves. This was before the plaintiff came into the picture at all.

The Court: He may answer this. It is more or less descriptive of what was done.

Mr. Gibson: And I want to add to the objection that it calls for a conclusion. [360]

Mr. Murphy re-wrote and revised the specifications I had written leaving out the clause covering the missing water-Wall tubes—

Mr. Gibson: (Interposing) I object to all this again, your Honor, and I ask that it be stricken from the record as a conclusion.

The Court: Yes; I think it may be stricken.

Question No. 18: Plaintiff now requests the Reporter [363] to identify the exhibit described by the witness in answer to Interrogatory No. 17, and offers this exhibit in evidence as Exhibit "A" of these interrogatories.

Mr. Gibson: To which we make objection, and

(Deposition of Delbert C. Smith.)

ask that it be stricken on the ground that this person testifying was not an agent or an employee of the defendant. It was an appraisal made before the final specifications and plans were submitted to the plaintiff for bidding. There was no privity of contract. It is just a rough draft prepared by the engineer and his superior, Mr. Hagan, apparently didn't like it.

The Court: I will take your motion to strike under advisement. [364]

EXCERPTS FROM DEPOSITION OF
EUSTICE C. CLAY

Q. Were you employed by the Hercules Company when what is known as a "stand-by" order was received in September of 1943, or about that time, with respect to the erection of certain boilers in power house No. 1 at Sunflower?

Mr. Gibson: I ask that the answer be stricken. It antedates the contract under discussion by practically a year.

The Court: I will permit him to answer. I don't know what the answer is.

A. I was.

The Court: I think it is well taken, but I will let it stand for the present, under the ruling I have heretofore made.

Q. Relate, briefly, what has been done with respect to the erection of these boilers in power house No. 1 before the stop order was received, and by whom it was done, if you know.

(Deposition of Eustice C. Clay.)

Mr. Gibson: We object to the witness testifying. He is not qualified as an expert, and no foundation to show that he was so qualified. [377]

The Court: I believe I sustained this same objection last Friday to the same line of testimony. However, under the present ruling it may go into the record, and I will determine later whether I shall strike it or not.

A. The material was presumed to have been all received and erection was proceeding at the time of the stop order.

Mr. Gibson: I move to strike the answer now as it is obviously a conclusion of the witness. He has said "the material was presumed to have been received."

The Court: I will sustain the objection to that.

Q. Do you know by whom the erection was being made at the time the stop order was received?

A. The erection was being conducted under the supervision of the Combustion Engineering Company who were furnishing the materials.

Q. Now, were you still employed by this company when the order which is known as the "resume work" order was received on or about May 3rd, 1944? A. I was.

Q. When the "stop" order was received state what was done with respect to the taking of an inventory?

Mr. Gibson: We object to that. It is without the knowledge of this witness, and it is remote, incompetent, and immaterial, and also irrelevant.

(Deposition of Eustice C. Clay.)

The Court: He may answer, but it will have to be connected up.

A. That was out of my jurisdiction and I do not know exactly how that was conducted, or by whom.

Q. Do you know what division was in control of making inventories so far as the Hercules Company is concerned?

Mr. Gibson: May we have the same objection as we had to the preceding question?

The Court: Yes, you may, and the same ruling.

A. Such work usually was inaugurated by the chief engineer to the division engineer, which in this case was Mr. Smith. The inventory would have been under — the physical inventory would have been under the direction of Mr. Fuhn, the property control engineer.

Mr. Gibson: Now we move the answer be stricken as hearsay, and not based upon any direct information of this witness.

The Court: Your motion will be taken under advisement, and the Court will reserve ruling.

Q. In what division of the Hercules Company?

A. The property control division.

Q. Now, who was this fellow Delbert C. Smith?

A. Mr. Smith was employed by the Hercules as division power engineer. [379]

Mr. Gibson: We object to that as not being responsive; that is asking for a description and not for the qualifications, or the employment of the man.

(Deposition of Eustice C. Clay.)

The Court: The answer may stand, subject to your motion to strike.

Mr. Gibson: Then I make a motion to strike at this time.

The Court: And your motion will be taken under advisement. The Court will reserve its ruling.

Q. Was he later employed by the A-E-M in the engineering department?

A. He was employed either by the A-E-M, or one of the subcontractors. I do not know on whose payroll he was.

Q. Now, relate briefly what you know about the preparation of specifications in June of 1944 after the "resume work" order was received.

A. The first word that I had that the "resume work" order was in, was when Mr. Smith called at my office and informed me of the fact.

Mr. Gibson: I ask that the answer be stricken as not responsive, the question being, "to relate briefly what you know about the preparations of the specifications after the resume order was received," and this is an interjection. [380]

The Court: It seems to me it is more or less immaterial, however it may stand. You may proceed.

Q. This was prior, was it, to the time when the bids were called for? A. Yes; it was.

Mr. Gibson: I object to this and ask that it be stricken as hearsay.

The Court: Your motion will be considered the same as the others.

(Deposition of Eustice C. Clay.)

Q. Now, what did you then learn about the presence, or absence?

A. May I correct that last?

Q. Surely.

A. Yes, it was, as I was informed by Mr. Smith.

Q. Now, what did you learn at that time about the presence or absence of certain water-wall tubes for this particular job?

A. Mr. Smith said that there were missing materials, that an inventory had been conducted, and as soon as it was definitely learned what was missing, I would be advised, in order to expedite that required material into the plant.

Mr. Gibson: I move that the answer be stricken. It is obviously hearsay, and without the knowledge of this man. We have the deposition of Mr. Smith before the Court. [381]

The Court: It would have to be connected up with the defendant in this case.

Mr. Watts: Yes; that is my understanding.

Q. You stated now that you were then the chief expediter for the Hercules Company?

A. Right.

Q. What, briefly, were your duties as such expediter? In other words, show please where you fit into this scheme of operation out there.

A. What one might call the chain of command originated the proceed order in Washington, which, in turn, was relayed by Ordnance, Washington, to the Corps of Engineers, Washington. Ordnance,

(Deposition of Eustice C. Clay.)

Washington, then advised the home office of Hercules Powder Company at Wilmington, who in turn advised the manager for Hercules at Sunflower. It went then to the chief engineer who directed the division engineer to proceed. A bill of materials would be drawn by the division engineer of missing or required parts and supplies, who would have it authorized or O.K.'d by the chief engineer, and would be brought to the purchasing department.

Mr. Gibson: To which I object, and ask that it be stricken as not being responsive, and also that it is hearsay. It may, or may not be, within the knowledge of this witness. The question was to state briefly his duties as such expeditor, [382] to show where he fit into the scheme of things, and he goes off on a long paragraph that is not responsive.

The Court: The same ruling as to previous questions and answers. You may have your motion to strike and it will be considered later by the Court.

Mr. Gibson: We make a special objection, and move to strike that, as not being responsive. Obviously there is a misunderstanding of the question by the witness. The witness was obviously thinking of the bidder specifying the material itself.

The Court: I will admit it under the same ruling.

Q. You know, of course, don't you, that there was subsequently a call for new bids by outside contractors for the erection of Power House No.

1?

A. Yes; Because the original contract had been completed and Combustion Engineering Company had so much other work at that time that they declined to re-bid to complete this power house physically.

Mr. Gibson: Now I ask that the answer be stricken as a conclusion of the witness. He admits that he is employed by Hercules and not by the Combustion.

The Court: The objection is clearly well taken, but you may proceed with the deposition, and I will consider this together with all the other matters.

Q. Before this new bid was offered, did you have this conversation with Mr. Delbert Smith?

A. I did.

Q. Now, did you have any more conversations with him [385] between that time and the time that the bid, or the award, was made to the Power Service Corporation? A. Several.

Mr. Gibson: To which I object and I want to say again that Mr. Smith was never employed by the defendant in this action. There is no connection of him as agent or employee, or anything, in any capacity, in any way, that he would be able to act for us. This was before the bids were offered, and was a preliminary step, and this testimony is obviously hearsay.

The Court: Of course, if counsel does not connect this up, it will all be stricken.

Mr. Watts: I think I have before the Court evidence of these conversations and conferences.

(Deposition of Eustice C. Clay.)

Q. Relate what was said and what was done between the time of your first discussion with Mr. Smith, and the time when the award was made to the Power Service Corporation?

Mr. Gibson: I tried to find something in this that would cast even a shadow as to Counts one, two or three, and I am not trying to pick a fuss with the Court or with counsel in this matter, but here are questions that they obviously cannot be binding on us, and here is a question, particularly, that calls for hearsay testimony. [386]

A. I called my liaison officer in Washington in the office of the Chief of Ordnance Ammunition Division, Major James Baldwin, and explained the situation, the urgency connected with it, because the urgency had been stressed to me by the commanding officer for the corps of engineers.

Mr. Gibson: I have made repeated objections, but I want to be sure that the Court is taking all of this testimony subject to my motion to strike, except, of course, where I will withdraw my objection.

The Court: Yes. That is fully understood, and I will say now without hesitation, counsel has said that he will connect it up with the defendant in this case. In addition to this testimony, other testimony is received subject to a motion to strike, and I will say that there is a great deal of this testimony that I am positive is nothing but a conclusion of the particular witness testifying, and would not be admissible if the witness were here himself.

(Deposition of Eustice C. Clay.)

However, I am going to proceed with this deposition, and you may have your motion to strike.

Mr. Sholz: Counsel has said that he can connect this up. Now, I would request counsel to make an offer of proof as to how he intends to connect this up, so that the Court may be advised now whether he can connect it up or not. [389]

The Court: I realize that counsel for plaintiff says he will connect this up, and I will let him proceed with the understanding that your objection is in to this entire deposition, and the matter is taken under advisement by the Court.

Q. Meaning whom?

A. I disremember his name, but he was a tall, thin individual that originally came from Kansas City.

Mr. Watts: It is indicated here that I asked Mr. Joslin a question, "Do you remember his name?" Mr. Joslin answered, "Major Matthews." And then the answer was continued as follows:

A. —where in a telephone conversation he stated to me that there was a possibility that a suit for damages might occur at a later date, should the materials, etc., not be available when required, and he felt I would be protecting my employers' interests if I used all possible dispatch in procuring this missing material.

Mr. Gibson: This man is an employee of Hercules testifying here, and it seems to me that this is the rankest kind of hearsay testimony.

(Deposition of Eustice C. Clay.)

The Court: Yes, this is. I agree. But he may proceed with the deposition, and the matter will be handled in the same way that I have indicated heretofore. [390]

DEPOSITION OF C. HOWARD MURPHY

Mr. Watts: This was taken on interrogatories on the 10th of January, 1947. "The said C. Howard Murphy appeared before me, and being personally sworn before me to tell the truth, made answers to the questions as follows:

Q. State your name.

A. C. Howard Murphy.

Question No. 2: Where do you live? At the present time?

Answer: Greeley, Colorado. [407]

Question No. 3: What is your business address?

Answer: 1023 Ninth Avenue, Greeley.

Question No. 4: In July, 1944, what was your occupation?

Mr. Gibson: I object to this testimony as Mr. Murphy was not employed by the defendant; he was not an employee of the defendant or an agent or employee in any manner, but was an agent or employee of the A-E-F. His testimony is incompetent, irrelevant and immaterial, and would not be binding on the defendant, and it is not within the issues of this case, and this is made as well as the specific objection to the item,—just strike that last portion. I will make the objection that the testi-

(Deposition of C. Howard Murphy.)

mony of Mr. Murphy is incompetent, irrelevant and immaterial, and not binding on the defendant, and it is not within the issues of this case.

The Court: I think, Mr. Gibson, your objection is well taken at this time, but I will admit it subject to a motion that it be stricken later.

Mr. Watts: Our reasons for this testimony is that this is the man who prepared the specifications which the defendant presented to us upon which we bid. They were the specifications of the defendant upon which we made our bid. [408]

The Court: Of course I expect you to sustain this testimony in your brief.

Mr. Watts: Yes, certainly.

Answer: I was manager of the subcontract department for William S. Lozier, Incorporated, Broderick & Gordon, usually referred to as the A.-E.-M., on the construction contract at Sunflower Ordnance Works.

Question No. 5: What, if anything, did you do in connection with the preparation of the specifications for the erection of boilers in Power House No. 1 when a resume word order was received by Col. Taylor in May of 1944?

Answer: I requested of the Engineering Division of the A.-E.-M. that technical specifications be submitted to my department to be incorporated into a contract specification giving the basis upon which to accept bids,—

Mr. Gibson: The rest of this answer, except what has been given now, I object to as incompe-

(Deposition of C. Howard Murphy.)

tent, irrelevant and immaterial, and hearsay, and is the expression of an opinion.

The Court: Mr. Watts may read the entire answer and then the Court will rule.

Mr. Watts: I will begin and read the entire answer:

Answer: I requested of the Engineering Division of the A.-E.-M. that technical specifications be submitted to my department to be incorporated into a contract specification [409] giving the basis upon which to accept bids. After a considerable delay I discovered that the specifications were not available and suggested to J. S. Hagan Engineering Division that since little progress was being made and that there was great urgency and necessity in getting the specifications prepared at the earliest possible date that he and I jointly assemble the information prepared to date in such a manner as to permit the taking of bids. This was done within the next two or three days. This was done by using principally the technical data which had previously been prepared by Mr. Delbert C. Smith.

Question No. 6: What knowledge did you have at that time of the presence or absence of materials on the site ready for erection?

Answer: I had no special knowledge of actual materials available,——

Mr. Gibson: ——I object to the rest of this answer as being hearsay and as being incompetent, irrelevant and immaterial.

(Deposition of C. Howard Murphy.)

The Court: I think it is hearsay, but he may continue with the answer.

Mr. Watts: May I read the question and answer again?

The Court: Just read the entire answer. The question is in the record, Mr. Watts.

Answer: I had no special knowledge of actual materials [410] available. However, I had knowledge that the materials intended for Power House No. 1 had been in storage for a considerable length of time, and I believed from the information obtained from Mr. Smith, both verbally and in the form of partially written specifications, that all of the essential materials were available and ready for erection. At the same time I knew from experience that some materials including flanges, couplings, hangers, bolts and miscellaneous items would be missing, and it was for that reason that I used the term "nearly all" at the commencement of clause 5-04 (c) of the specifications.

Mr. Gibson: Now, I make a motion to strike the answer as not responsive to the question asked, and as being voluntary and based upon a conclusion of the witness. The vice of this is that we were given the proposed interrogatories by mail. We had no way of knowing what kind of counter interrogatories we could prepare. However, we did prepare them on the main question of the contract. Now Question No. 6 of these interrogatories is: "What knowledge did you have at that time of the presence or absence of materials on the site ready

(Deposition of C. Howard Murphy.)

for erection?" And he gives an answer to that,—a complete answer to the question and then goes on with a conclusion as to why he answered the question. It gives his judgment and his reasons, and those are of no concern to us. He was given a job to do, and as far as we were concerned plaintiff accepted the contract. Of course we have our interpretation of the matter. We certainly object to this being in the record. It is unfair, and counsel knows that it is.

Mr. Watts: I think, if the Court please, this is an entirely proper answer. The Court is interested in getting the facts of this matter.

Mr. Gibson: We want the facts, and we also want the truth.

Mr. Scholz: He states in the previous answer that technical specifications would be submitted to his department. He is a draftsman. He gives this information or opinion. He says, "I knew that certain materials were missing." Now, furthermore, if the Court please, the question is specifically, "What knowledge did you have at that time of the presence or absence of materials on the site ready for erection?" We had no way of knowing what Mr. Murphy's answer would be.

The Court: The answer to the question is followed by a lot of hearsay. I don't see how it has any bearing on Count No. 2 or No. 3; his reasons for writing the specifications is all included in there, and I think that portion will be stricken.

(Deposition of C. Howard Murphy.)

The rest of the answer will be left in the record, and of course that will be subject to your motion to strike, and the motion will be considered to have been made at this [412] time.

Mr. Gibson: Now, I understand the portion the Court has ruled on is that portion starting with the word "however." Where it does not directly answer the question.

The Court: That is correct. At this time we will take a fifteen minute recess.

March 24th, 1947, 3:15 p.m.

The Court: You may continue with your deposition, Mr. Watts.

Question No. 7: Specifically, when you prepared these specifications did you know that any tubes or headers were missing?

Answer: No.

Question No. 8: Specifically, when the award was made to Power Service Corporation on July 13, 1944, did you know that any of the tubes or headers were missing?

Answer: No.

Question No. 9: Did you know that any of the tubes or headers were missing when you mailed the contract to Power Service Corporation on July 14th for their signature?

Answer: No.

Question No. 10: Are you familiar with the history of special clause relating to damages which appears on the signature page of the contract be-

(Deposition of C. Howard Murphy.)

tween Cory, Joslin & Macnsons [413] and the Power Service Corporation?

Answer: I am somewhat familiar with the clause. However, upon receipt of a request from Power Service Corporation that a clause be incorporated into the contract with respect to damages for delay, I turned the request, together with available information, over to the Legal Department of the A.-E.-M., meaning to Phillip A. Dergance, attorney for the A.-E.-M., for his recommendation and action.

Question No. 11: Now, Mr. Murphy, how long have you been an architect?

Answer: Ten years.

Question No. 12: Are you familiar with the normal sequence of erection of work of a type similar to the boiler erection at Sunflower Ordnance Works?

Answer: Yes, sir.

Question No. 13: Where there are three or more similar operations to be performed by the foreman and mechanics, tell the Court whether or not efficiency normally increases with the second and third operations.

Answer: Yes, normally.

Question No. 14: Now, what happens when the sequence of operations is broken, for example, by delay in obtaining materials during construction?

Answer: It would very logically decrease efficiency, and therefore increase costs. Here is what happens: When a stoppage [414] occurs because of

(Deposition of C. Howard Murphy.)

the lack of materials it is necessary to terminate mechanics or find other work for them. If the stoppage occurs for any length of time frequently a new crew must be assembled and trained to perform a given operation at the same cost as the first operation, and the contractor loses the benefit of any increased efficiency on the subsequent operations. I believe this was particularly true during the war period when there was a large labor turnover. The percentage in loss of efficiency would, of course, vary with different operations and different workmen, but there is definitely a real loss of efficiency when anticipated construction schedules are interrupted by lack of materials.

Mr. Watts: At this time the plaintiff offers in evidence the deposition of E. E. Taylor, a witness called by the plaintiff, and after being first duly sworn, testified as follows: [415]

DEPOSITION OF E. E. TAYLOR

having been first duly sworn, testified and deposed as follows:

Direct Examination

Question: State your name, please.

Answer: E. E. Taylor.

Question: Where do you live, Mr. Taylor?

Answer: 1641 Dayton Avenue, St. Paul.

Question: And what is your present business address?

(Deposition of E. E. Taylor.)

Answer: 614 Builders Exchange, Minneapolis.

Question: What is your present occupation, Mr. Taylor?

Answer: I am treasurer of the Mid-west Engineering, Incorporated.

Question: What is your profession or business, generally? Answer: Engineer.

Question: How long have you been an engineer?

Answer: Since about 1922.

Question: Twenty-five years then, is that right?

Answer: That is right.

Question: Generally, what has been the nature of your experience as an engineer? Relate it briefly, please.

Answer: All kinds of construction work, preparation of plans, the specifications, supervision of it, and contracting.

Question: During the years 1943 and up until July 12th [416] 1944, where were you employed, or occupied? And in what capacity?

Answer: I was an officer in the Corps of Engineers, United States Army.

Question: Where were you stationed?

Answer: From September, 1943, until,—wait a minute,—September, 1942, until July, 1943, I was Area Engineer and later Resident Engineer at the Sunflower Ordnance Works, DeSoto, Kansas.

Question: And in that capacity you carried the title in the Government of what?

Answer: I had several titles, one of them when

(Deposition of E. E. Taylor.)

I went there, I was listed as a Major in the Corps of Engineers, and later a Lieutenant Colonel, and I was contracting officer for the Sunflower Ordnance Plant.

Question: What was your rank then at the time that you left there on July 12th, 1944?

Answer: Lieutenant Colonel.

Question: And you occupied the office, or you were serving in the capacity of what, at that time?

Answer: Resident Engineer and Contracting Officer.

Question: On behalf of the United States Government? Answer: That is right. [417]

Mr. Watts: On page forty-four, near the top of the page: "Question: What happens to the efficiency of a construction crew because a contractor runs into a delay because of lack of materials?"

Mr. Scholz: Now, we want to object to this, if the Court please, as being incompetent, irrelevant and immaterial and calling for a conclusion of the witness, and it is without foundation. Colonel Taylor was not on this job after the twelfth of July. He is testifying now as an expert, and this does not include all of the factors, or all of the facts which would enable the witness to testify to a hypothetical question.

The Court: It would not apply particularly to this job, but to ordinary jobs. I think that anyone could testify that there would be delays if there was no material with which to go ahead. I believe I will permit him to answer.

(Deposition of E. E. Taylor.)

Answer: Oh, the efficiency is materially reduced. Men have a tendency to slow down if they become aware that the material is running out, and if the time of the contract is extended, why, the overhead naturally goes up.

Mr. Gibson: Now, I move that the answer be stricken on the grounds states in the motion in the deposition, that it is a conclusion; that it is incompetent, irrelevant and immaterial, and not a statement of fact, and without foundation.

The Court: That is probably true, but the answer may stand. [429]

Mr. Gibson: And there were some facts that were not included in the question presented to the witness.

The Court: That is probably also true, but the answer may stand for the present, at least.

Mr. Gibson: We make the objection also that it does not say that there may be other work on the job so that these men could keep on going.

The Court: I am wondering now which question the objection is made to?

Mr. Gibson: There were two questions there that are practically the same, and if agreeable, my objection may go to both of those questions.

Mr. Watts: The question at the bottom of page forty-four: "State whether or not when delays are encountered in furnishing materials it normally takes the labor a longer period in which to complete a contract."

(Deposition of E. E. Taylor.)

Mr. Gibson: Now then, my objection may also go to that question?

The Court: Yes; it may. And I think I will permit him to answer, subject to your objection. It seems to me rather immaterial.

Answer: Well, it would naturally follow that if they had to wait for materials that it would take them longer to complete it. [430]

The Court: That seems a very logical answer.

Question: Is there any resulting loss in efficiency during the time that the men are working?

Mr. Gibson: We make the same objection.

The Court: He may answer.

Answer: There usually is, especially if they are aware of the fact that you are running out of materials.

Question: I hand you what has been marked here for introduction in the trial as Exhibit No. 66. Tell me what that exhibit is, first, please.

Answer: That is a construction schedule for subcontract for No. 5-5 for the completion of Power House No. 1.

Question: Tell me how these charts are originally prepared for use in this project.

Mr. Scholz: Mr. Anderson made the objection that it is incompetent, irrelevant and immaterial, and we renew it at this time. This officer was not present on the job. If he is testifying as to the usual procedure, I will withdraw the objection.

The Court: He may answer.

(Deposition of E. E. Taylor.)

Answer: Well, these charts are arrived at by working backwards. You have a required completion date that you must meet, which gives you your over-all curve. Then you break down the various items of work and schedule them so that you will meet the completion date. The main bar at the top of this chart covers the over-all job. On this chart there are six major divisions of work. When these charts are originally prepared you start out with a white bar. The divisions show the percentages which are to be completed at certain dates. For each period the bars are cross-hatched to show what the scheduled completion is and filled in with black to show the [432] actual completion. In this instance here, on this chart which is dated 10-27-44, the main bar showed a scheduled completion of about ninety-five percent, and an actual completion of about seventy-nine per cent.

Question: And the actual completion then is represented by what lines?

Answer: By the solid bar.

Question: Who prepared these construction schedules, and what was done with them?

Answer: They were prepared by the contractor, or rather the subcontractor, in consultation with the A.-E.-M., Architect-Engineers-Managers.

Question: Were they given to, or used by, the contractor in this case, Cory, Joslin & Macnsons?

Answer: They had a wide distribution. They were distributed to everyone on the job, including

(Deposition of E. E. Taylor.)

Cory, Joslin, who was interested in it, and they were distributed to my office, and in turn were used as a basis for the preparation of over-all charts which eventually landed in the Chief of Engineers.

DEPOSITION OF FRANK V. WEDLICK

a witness on behalf of the plaintiff, having been duly sworn, testified and deposed as follows: [434]

Direct Examination

Question No. 1: State your name, address, and business.

Answer: Frank V. Wedlick, 2230 Harlan Boulevard. I am educated as an engineer, and at present am engaged in the manufacture of gas furnaces.

Question No. 2: What date did you commence work for the firm of Cory, Joslin & Macnsons?

Answer: I started in November, 1942.

Question No. 3: What date did you quit work for that company?

Answer: I quit in December of 1944. [435]

Question No. 15: Mr. Wedlick, how many years have you been in the contracting business?

Answer: I am not in the contracting business, but as an engineer I have handled contracting jobs for over twenty [437] years.

Question No. 16: In your experience as an engineer, what are some of the damages that are suffered when a contractor is delayed on a job like the one Power Service Corporation had at Sunflower?

(Deposition of Frank V. Wedlick.)

Answer: The first is shortage of materials. You have to stop and re-plan, and re-schedule the work progress, and adverse weather elements, labor troubles, break-downs in equipment, and holding together your personnel when there are work stoppages due to shortages of materials. [438]

DEPOSITION OF LAWRENCE J. NEUBAUER

a witness for the plaintiff, having been first duly sworn, testified and deposed as follows:

Direct Examination

Question: State your name, please.

Answer: Lawrence J. Neubauer.

Question: Your residence address?

Answer: 4321 West Forty-second Street, Minneapolis.

Question: How long have you lived in this city?

Answer: I have lived in this city two years this month.

Question: What is your occupation?

Answer: Mechanical engineer.

Question: How long have you been in the profession?

Answer: Since graduation from the University in 1921.

Question: Approximately twenty-six years. In 1944, in the month of July, by whom were you employed?

Answer: Employed by Hercules Powder Company.

(Deposition of Lawrence J. Neubauer.)

Question: In what capacity?

Answer: As construction mechanical engineer.

Question: And how long did that employment continue? Until about what date?

Answer: I think I was there a little over a month, probably a month and a half.

Question: And then with whom did you go?

Answer: Lozier, Broderick & Gordon.

Question: And as a mechanical engineer with Lozier, Broderick & Gordon, did you have an office next door to the Power Service Corporation kept by Mr. Borst? Answer: Yes, sir. [440]

DEPOSITION OF MR. P. C. GAFNEY

a witness on behalf of plaintiff, having been first duly sworn, testified and deposed as follows:

Direct Examination

Interrogatory No. 1: State your name and address. [459]

Answer: P. C. Gafney, 5624 Grand Avenue, Minneapolis, Minnesota.

Interrogatory No. 2: What is your occupation?

Answer: Treasurer of Power Service Corporation.

Interrogatory No. 3: How long have you been the treasurer of the Power Service Corporation?

Answer: Ten years.

Interrogatory No. 4: Did you occupy this position during the entire year of 1944?

(Deposition of P. C. Gafney.)

Answer: Yes.

Interrogatory No. 5: State whether or not the books of the Power Service Corporation for 1944 were kept under your supervision and direction?

Answer: Yes.

Interrogatory No. 6: From those books please state the total amount of the overhead expenses of the Power Service Corporation for the year 1944.

Mr. Sholz: We object to that as incompetent, irrelevant and immaterial. The best evidence are the books themselves, or certified copies.

Mr. Watts: We have it here.

The Court: The objection will be sustained.

Mr. Watts: I offer to show that the witness would, if permitted to answer, testify that the amount of overhead [460] expenses for the year 1944 was \$75,316.58.

The Court: You may proceed, Mr. Watts.

Interrogatory No. 7: Do you know, independent of those books of your own knowledge, the amount of overhead expenses for the Power Service Corporation for the year 1944?

Answer: Yes.

Interrogatory No. 8: How much were such expenses? Answer: \$75,316.58.

Interrogatory No. 9: Give the specific items and amounts thereof which go to make up this total overhead expense of \$75,316.58.

Mr. Scholz: We object to that as incompetent, irrelevant and immaterial, and also on the same

(Deposition of P. C. Gafney.)

ground as stated in an objection heretofore made. Here is a man who is treasurer of the company, and not an accountant.

The Court: I will permit him to answer this question, in view of the statement that was made in one of the previous answers, that he was able to tell the expenses, or knew the expenses of this company, aside from what was shown in the books, that he had independent knowledge. I will permit him to answer in view of that statement, but I will say that I hardly believe that statement.

Mr. Gibson: We also object to that as not being the best evidence.

The Court: He may answer. [461]

Answer: Advertising, \$186.00; drafting-room expense, \$6.80; legal expense, \$1,075.00; office and general expense, \$2,257.02; insurance, \$681.61; pension retirement fund, \$7,556.89; postage, \$230.00; prospective business, \$3,014.80; rent of office, \$1-903.36; repairs to equipment, \$147.09; telephone and telegraph, \$192.81; taxes, capital stock, \$875.00; unemployment compensation and excise, \$631.16; social security, \$162.66; sundry, \$71.68; depreciation, equipment, \$540.90; yard expense, \$14.29, making a total of \$75,316.58.

The Court: That is quite a remarkable bit of evidence. As the saying is, he certainly was some man to testify all that independent of any records.

Interrogatory No. 10: Do the books kept by you and under your supervision reflect the same

(Deposition of P. C. Gafney.)

amounts as those to which you have above described? Answer: Yes.

Interrogatory No. 11: Do you know, independent of the books and records of the Power Service Corporation, that the amounts set forth in your answer to interrogatory No. 9 were actually expended by the corporation during the calendar year 1944? Answer: Yes, sir.

Interrogatory No. 12: Have you an independent audit made [462] by outside auditors of the books of the Power Service Corporation for the year 1944? Answer: Yes.

Interrogatory No. 13: By whom?

Answer: By the firm of Black, Hanson & Company, Chartered Accountants. Their office is at Port Arthur, Ontario, Canada.

Mr. Watts: At which point there is a notation in the deposition which says, "Which said document was marked Plaintiff's Exhibit "A" by the Reporter, and is returned herewith."

Interrogatory No. 14: I hand you what has been marked by the Reporter as Plaintiff's Exhibit "A" in these interrogatories. Please identify this document for the record.

Answer: This is the report on audit with relative financial statements for the year ending 31st of December, 1944, prepared by Black, Hanson & Company.

Interrogatory No. 15: Does Exhibit "A" reflect the over-head expenses of this corporation in

(Deposition of P. C. Gafney.)

the same amounts as those to which you have testified?

Answer: Yes; and it shows our total overhead expense for 1944 to have been \$75,316.58.

Interrogatory No. 16: Plaintiff now offers in evidence Exhibit "A" to be attached and made a part of these interrogatories. [463]

Mr. Scholz: I have had no opportunity to examine this audit.

Mr. Gibson: And I have not seen any report of the audit, and have had no chance to examine it.

Mr. Watts: Here is the audit he was reading from.

Mr. Gibson: I object to it as incompetent, irrelevant and immaterial.

The Court: In order to save time I will admit it subject to a motion to strike. You may examine it later, and you may make a motion to strike.

Interrogatory No. 17: By way of comparison, what was the total amount of the deductions taken by your corporation on its Federal income tax return for the year 1944?

Answer: \$75,479.35.

Interrogatory No. 18: Will a signed copy of your 1944 Federal Income Tax return be available for trial of this action? Answer: Yes.

Interrogatory No. 19: Do you know, independent of the audit above referred to, that the total sum of \$75,316.58 was actually expended by the Power Service Corporation for overhead expenses during the calendar year 1944?

(Deposition of P. C. Gafney.)

Answer: Yes.

Interrogatory No. 20: What contract, other than the Sunflower [464] Ordnance Works contract did your corporation have in progress during the period between November 10th and December 19th, 1944?

A. We had two contracts in progress; one with the Board of Heating Commissioners at Sleepy Eye, Minnesota, and the other with the Union Pacific Railway Company, Salt Lake City, Utah.

Interrogatory No. 21: Please state the contract price for each of these two contracts.

Answer: The contract price at Sleepy Eye was for \$15,956.00 and the one at Salt Lake City was for \$80,740.00.

Interrogatory No. 22: What was the average number of men employed on each of these two contracts during the period between November 10th and December 19th, 1944?

Answer: The average number of employees during that period of time on the Sleepy Eye contract was four; and on the Salt Lake City contract the average was eighteen.

Interrogatory No. 23: What was the average number of employees during the same period on the Sunflower Ordnance Works contract?

Answer: Eighty-nine.

Interrogatory No. 24: What was the total contract price on the Sunflower Ordnance Works contract? Answer: \$466,821.07. [465]

(Deposition of P. C. Gafney.)

Interrogatory No. 25: What was the total field pay roll on the Sunflower Ordnance Works contract at the end of December 19th, 1944?

Answer: \$227,418.27.

Interrogatory No. 26: What was the total field pay roll on the Sunflower Ordnance Works contract as of the close of November 10th, 1944?

Answer: \$181,467.26.

Mr. Watts: That is all of the direct interrogatories.

The Court: Do you care to go on with the cross interrogatories of this witness, Mr. Gibson?

Mr. Gibson: Yes; I will read the cross interrogatories and answers. They start near the bottom of page seven of the deposition:

Cross Interrogatories

Cross-interrogatory No. 1: Referring to Interrogatory No. 7, just what do you include as overhead?

Answer: Home office expenses, payroll taxes, and so forth.

Mr. Scholz: These were all put in writing, and of course we expected the same degree of sincerity in answering the cross interrogatories as he gave to the plaintiff.

The Court: You may proceed with the cross interrogatories, Mr. Gibson.

Cross-interrogatory No. 2: Is not overhead confined [466] to indirect cost, such as home office, administrative forces and non-productive work?

(Deposition of P. C. Gafney.)

Answer: Yes.

Cross-interrogatory No. 3: Are not field foremen and field superintendents only employed during actual construction? Answer: No.

Cross-interrogatory No. 4: Do you include the field foremen and field superintendents in charge of erection and construction as overhead?

Answer: No.

Cross-interrogatory No. 5: Are not field foremen and field superintendents items of labor on every job, and should they not be carried as labor and not carried as overhead? Answer: Yes.

Cross-interrogatory No. 6: What per cent of your home office expense would be charged against the Sunflower Ordnance Works job?

Answer: There is no home office expense assigned to any particular contract.

Cross-interrogatory No. 7: What percentage of the Power Service Corporation's home office forces are the same personnel as employed by the Fegels Construction Company?

Answer: Only the corporate officers.

Cross-interrogatory No. 8: Are not the offices and space [467] occupied by Power Service Corporation the same officers, and the same office space as that of the Fegels Construction Company?

Answer: Yes.

Cross-interrogatory No. 9: Would not the amount, or per cent, of the overhead, including home office, office personnel and officers' salaries

(Deposition of P. C. Gafney.)

be distributed according to volume of work performed by each company?

Answer: No; this is entirely Power Service Corporation overhead.

Cross-interrogatory No. 10: Do your records show the salaries of both the Power Service Corporation's home office employees and employees of the Fegels Construction Company?

Answer: No; Power Service Corporation is a separate corporate entity.

Cross-interrogatory No. 11: What do they show for the year 1944?

Answer: Power Service Corporation's records show \$75,316.58.

Cross-interrogatory No. 12: Do your records show the volume of business done by each, the Power Service Corporation and the Fegels Construction Company for the year 1944?

Answer: No. Power Service Corporation's records do not show anything in connection with Fegels Construction Company. [468]

Cross-interrogatory No. 13: Do your records show a segregation of overhead in accordance with the volume of work done by each, the Power Service Corporation, and the Fegels Construction Company in the year 1944? Answer: No.

Cross-interrogatory No. 14: What was the amount of overhead charged against the Sunflower Ordnance job?

Answer: None, directly. All the overhead is reflected in the statement on Exhibit "A".

(Deposition of P. C. Gafney.)

Cross-interrogatory No. 15: What per cent of the total volume of work at the Sunflower Ordnance does this amount represent?

Answer: See statement on Exhibit "A".

Cross-interrogatory No. 16: \$75,316.58 represents what per cent of the total volume of work done by Power Service Corporation in the year of 1944?

Answer: One hundred per cent of the overhead.

Mr. Gibson: That is the cross interrogatories of the witness Gafney.

Mr. Watts: We now offer the deposition of Emil Nelson. This was taken at the same time some of the other depositions were taken, on the 20th of January, 1947, and it shows that Mr. Emil Nelson was called as a witness, and upon being duly sworn, testified as follows: [469]

DEPOSITION OF EMIL NELSON

a witness on behalf of plaintiff, having been duly sworn, testified and deposed as follows:

Direct Examination

By Mr. Watts:

Question: What is your name, please?

Answer: Emil Nelson.

Question: Where do you live?

Answer: 5348 Thirty-sixth Avenue South, Minneapolis.

Question: What is your occupation?

Answer: Construction superintendent.

(Deposition of Emil Nelson.)

Question: How long have you been a construction superintendent, or in construction work?

Answer: Oh, I have been working for this company about twenty-eight years.

Question: Working for what company for twenty-eight years? What is the name of the company?

Answer: Power Service Corporation.

Question: Are you presently employed by that company?

Answer: Yes; I am. Can I correct that statement? That means how long I have been working for the company?

Question: Yes.

Answer: In other words, the construction company I worked for is practically the same thing. Power Service Company is a [470] subsidiary of the Hercules Construction Company.

Mr. Watts: The Reporter no doubt meant to say the Fegels Construction Company, and not the Hercules Construction Company. I think that will be agreed.

Question: Were you employed by this company during the period from July 11th, 1944, to December 19th, 1944? Answer: Yes, sir, I was.

Question: Where?

Answer: Sunflower Ordnance Works.

Question: And that is where?

Answer: Kansas.

Question: In what capacity were you employed down there?

(Deposition of Emil Nelson.)

Answer: Construction superintendent. [471]

Question: During the performance of the Power Service Corporation's contract at Sunflower Ordnance Works, state whether or not any shortages occurred?

Answer: Yes, sir; there was.

Question: All right. When, with reference to the commencement of the work, did those shortages become discovered?

“Mr. Anderson: That is objected to as calling for a conclusion, without foundation, and it is irrelevant and immaterial.” [472]

Mr. Gibson: And we adopt that objection.

The Court: He may answer.

Answer: When I first came down there I noticed a shortage of roof tubes. That is the first shortage we noticed.

Question: What else?

Answer: As we went along we were short of water-wall tubes and then water-wall headers. It was not correctly drilled and so we had to send one back and rob one from the other boiler, and then wait until we got another in its place.

“Mr. Anderson: I move that the answer be stricken on the ground of the objection, and on the further ground that it is not responsive, and a mere conclusion.”

Mr. Gibson: We adopt that motion. It seems that certainly he could have fixed the time that he arrived.

(Deposition of Emil Nelson.)

The Court: The answer may stand.

Question: Now, how soon after you commenced work there did you discover that the roof tubes were missing?

Answer: Well, that was when I first came there.

The Court: There is no claim of any delay except on account of delay because of missing water-wall tubes and headers. It seems to me that we are going into everything else, showing everything that was short, and taking a lot of time, but I suppose inasmuch as we have gone this far we might as well go ahead. I might suggest, however, that the defendants have not [473] disputed the fact that the water-wall tubes and headers were short, and as I gather it, there is no claim of any other shortage,—you may go ahead, Mr. Watts.

Question: And how soon did you discover that the water-wall tubes were missing?

Answer: Well, that was during the erection.

Question: Well, within what period of time, approximately, after you commenced?

Answer: Oh, I would say about a week or so.

Question: You spoke something about their being errors in the fabrication of the water-wall headers. Describe that in detail, please.

“Mr. Anderson: That is objected to as incompetent, irrelevant and immaterial, and not within the issues of this case.”

Mr. Gibson: We adopt that.

The Court: He may answer.

(Deposition of Emil Nelson.)

Answer: We erected the water-wall headers and when we came to put the tubes in, the top one had more holes than the bottom one. They didn't match.

Question: What number boiler was that discovered in? Answer: Number two.

Question: What did you do when you discovered that?

Answer: Well, they took the headers down, and we replaced [474] it with one header from No. 3 boiler, and sent the header that was wrong,—sent it back to the factory and it was replaced in number three.

Question: In what way was it wrong, or improperly manufactured?

Answer: Well, the spacing of your holes wasn't laid out right. In other words, it had too many holes in one, or more in one than you had in the other.

Question: And what did you do in the meanwhile for a header for boiler No. 3?

Answer: Well, we had to wait until we received a new header.

Question: Were you delayed any in the performance of the contract while waiting for the new header for boiler No. 3?

“Mr. Anderson: Objected to as calling for a conclusion, without a statement of fact, and without a foundation.”

Mr. Gibson: We object to that as calling for a conclusion of the witness; and as being incompetent, irrelevant and immaterial, and no proper

(Deposition of Emil Nelson.)

foundation having been laid. He does not state in this situation all of the surrounding facts; the delay of any particular header does not mean being delayed on the job as a whole, and we object to this question.

The Court: He may answer.

Answer: Why, certainly we were delayed. [475]

Question: Now, did you come across any other errors in fabrication and in materials that were used in the performance of this contract?

Answer: Well, the boiler tubes in boiler No. 2 on the rear wall header, that was too large holes. I think it was three and one-half inch holes instead of three inch holes.

Question: And as a result of that, what was necessary to be done in order that tubes might fit the header?

Answer: Well, they had to cut the tubes and then weld another nipple, as we call it, to enlarge the tube.

Question: Under your supervision was that done?

Answer: That was by the boiler company.

Question: And the name of that company is what?

Answer: Now, I can't recall it. Faucit-Wheeler, I think.

Question: In any event, did this boiler company send representatives there to help do this work?

(Deposition of Emil Nelson.)

Answer: Yes; it had to be a certified welder do that work.

Question: Was any delay experienced as a result of this enlargement of these tubes?

Answer: Why, certainly.

Question: Now, I want you to state for the benefit of the Court the normal sequence of erecting a boiler unit. What are the natural steps that must be taken in order?

“Mr. Anderson: I object to that as without foundation, and incompetent, irrelevant and immaterial.” [476]

Mr. Gibson: We adopt that objection, that it is incompetent, irrelevant and immaterial. This witness is not qualified as a boiler maker or a boiler man, to know the sequence of the operation. It is simply filling up the record with immaterial testimony.

The Court: We have had a lot of testimony in this case that seems to be doing nothing but encumbering the record, but, as I understand it, counsel does not have a great deal more of this testimony. I believe that he made the statement, possibly not in the record, however, that he only had some thirty minutes more of this. I think he may proceed.

Answer: Well, you erect your drums and line your drums up and then stick your tubes in and then you put in water-wall headers, and all, and your water-wall tubes, and in fact all of it, and then you drop your brick work, and after that you

(Deposition of Emil Nelson.)

put up air ducts and air headers, and the air headers can be installed at any period at any time, because the air header is a separate unit.

Question: And what is the last process that you do?

Answer: You try out the boiler and make out your tests. As soon as you roll your tube before the brick work, you make your hydrostatic tests.

Question: In this normal sequence of construction of a boiler unit, where, with reference to the commencement of the [477] work, does the installation of the water-wall tubes and headers come?

"Mr. Anderson: 'The same objection.'"

The Court: He may answer.

Answer: What was that? Oh, well, that is second. The drum, first, and the tubes second.

Question: Well, is it normal for this work to be done after, for example, the building of the ash hopper?

Answer: Well, ash hopper, that is one of your last things. In other words, your drums, your tubes, and then your hydrostatic tests before you do your brick work.

Question: Can you make your hydrostatic tests before you install your tubes for the header?

Answer: No, sir, because the boiler is open, that is all.

Question: Tell the Court whether or not in this instance the normal method of installation was followed in the performance of this contract?

"Mr. Anderson: I make the same objection."

(Deposition of Emil Nelson.)

The Court: He may answer.

Answer: Well, you couldn't go ahead and do it. You would have to lay off work on that particular boiler until you received your material. You couldn't put on your hydrostatic tests until you put in your tubes.

"Mr. Anderson: I move that the answer be stricken because it is not responsive, and because of the grounds stated [478] in the objection."

The Court: The answer may stand.

Mr. Gibson: The Court has in mind that we adopt all of these objections and motions?

The Court: The same ruling, Mr. Gibson.

Question: What I would like to know is, whether or not in the performance of this contract you were able to follow and did follow the normal sequence of construction?

Answer: No; we were not.

Question: Tell the Court why.

"Mr. Anderson: The same objection."

The Court: You may read the answer.

Answer: Well, we didn't have our water-wall tubes, or our roof tubes for No. 1 and No. 2. We didn't have our headers so that we could just keep going,—the same as an assembly line, or whatever you would want to call it.

Question: And when you ran into these delays because of the missing materials, what did you do with your crews?

"Mr. Anderson: Objected to as calling for a

(Deposition of Emil Nelson.)

conclusion, without foundation, and irrelevant and immaterial."

Answer: Well, we would have to put our crews somewhere else and keep them going until we received the materials.

Question: Did you, in fact, do that?

Answer: Why, certainly.

Question: What else did you have to do with respect to your [479] construction equipment?

Answer: Well, you have to move that where you are. In other words, your hoist and your block and tackle is rigged up to that particular work, and when you found it was short you had to move it away to something else.

Question: And then when the material came in for construction, what did you have to do again?

Answer: Move it back, of course.

Question: And what about your crews?

Answer: Shift them back.

Question: Was there any loss of efficiency as a result of shifting these crews from one job to another?

Answer: Why certainly.

"Mr. Anderson: Just a minute. I object to that as calling for a conclusion, and without foundation, and it is incompetent, irrelevant and immaterial."

Mr. Gibson: And I want to add to that: That it is calling for a conclusion and he has no basis for the knowledge. He is not able to tell.

The Court: He may answer.

(Deposition of Emil Nelson.)

Mr. Watts: I think I read the answer, but I will read it again.

Answer: Why, certainly.

Question: All right. State what happened with respect to [480] efficiency when you moved the crews from one job to another, and when you moved the construction equipment when you moved?

“Mr. Anderson: The same objection.”

The Court: You may read the answer.

Question: State what the fact was.

Answer: There was a loss of time in moving your equipment.

Question: Now, in the performance of this contract was there any particular classification of work which had to be done the same on boiler No. 1, No. 2 and No. 3?

Answer: Well, all three boilers was identical, so naturally it is the same procedure, if that is what you are asking me.

Question: Now, what is ordinarily the normal method that you follow where you have three boilers to erect, so far as procedure is concerned?

“Mr. Anderson: Objected to as calling for a conclusion, and without a foundation, and incompetent, irrelevant and immaterial.”

The Court: You may read the answer.

Answer: Well, shall I go ahead?

Question: Yes.

Answer: When you have got three identical things, you organize it. So many men to put up drums, and naturally that [481] gang goes from

(Deposition of Emil Nelson.)

one to another one and erects the drums. And the next gang comes behind and stick in tubes, and the third gang comes and in that way it keeps on going and then if you go further another gang makes the tests and so on.

Question: Does the man who does certain work in the first operation ordinarily pass to the second operation and perform that operation?

Answer: Why, certainly.

Question: And then to the third operation?

Answer: Why, certainly.

Question: He performs, for example, the same type of work on boiler No. 2 as was performed on No. 1? Answer: That is right.

Question: And then goes to No. 3 and performs the same work on No. 3 as heretofore performed on boiler No. 1 and No. 2; is that correct?

Answer: That is correct.

Question: Each crew works that way?

Answer: That is correct.

Question: Now, what must the superintendent of construction, and the foremen, and the laborers in these respective crews do when they come to the first operation with respect to consulting the blue prints and the like? Do you know what they do?

“Mr. Anderson: That is objected to as calling for a conclusion, and hypothetical, and incompetent, irrelevant and immaterial.”

The Court: He may answer.

Answer: When they first start there is a little

(Deposition of Emil Nelson.)

general figuring out what to do and how to do it. It is a little confusing, the same as the starting any other particular job. You read your blue prints and get the things started.

Question: Do you talk it over with the men and explain it to them?

Answer: That is right. Why, sure.

Question: Now, when you come to the second operation, are you able to perform the second operation any more efficiently or quicker than the first under normal circumstances?

“Mr. Anderson: Objected to for the same reasons.”

The Court: He may answer.

Answer: Why, certainly. When you do things over and over again, why, naturally you become more familiar with what you are doing and so on. In other words, the same as an assembly line, when you have once done it it is to do it over and over again.

Mr. Watts: There seems to have been a word left out there, but I read it just as it is. I think perhaps it should read, “It is easy to do it over and over again,” but [483] I will have the answer in the record just as it appears here.

Question: And to that extent, the third operation you are able to do it more quickly and efficiently than the first and second operations?

“Mr. Anderson: The same objection.”

The Court: The same ruling.

Answer: Why, certainly.

(Deposition of Emil Nelson.)

Question: Now, you know about the normal length of time that is required for each one of these operations, don't you?

Answer: Yes, pretty well; yes.

Question: Tell the Court whether or not you were able to perform, or finish, your work on the first boiler as quickly as you normally would have been able to on account of these stoppages and shortages?

“Mr. Anderson: Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion, and not a statement of fact.”

Mr. Gibson: I object on the same grounds, and add to it: That he is constantly injecting foreign elements into this matter. Now, he doesn't claim to know about this type of a boiler.

The Court. He may answer. This, I understand, will all be connected up. [484]

Mr. Watts: This man is the construction superintendent, and I have already put in the testimony of Mr. Borst on this matter. Now, I am giving the Court the benefit of this man's testimony, who is, as has been testified to in this deposition several times, the construction superintendent.

The Court: You may proceed, Mr. Watts.

Answer: Naturally you couldn't finish it as fast as if you could go ahead and finish it.

Question: Tell the Court whether or not the work on the first boiler in this instance took longer than normal?

“Mr. Anderson: The same objection.”

(Deposition of Emil Nelson.)

The Court: He may answer.

Answer: It certainly did; yes.

Question: And the reason it took a longer time is what?

"Mr. Anderson: The same objection."

The Court: He may answer.

Answer: Well, delayed materials. In No. 1 the roof tubes were not there, so naturally we couldn't start the second operation and put on our tests.

Question: Now, when you came to the performance of the contract so far as the second boiler is concerned, were you able to perform that any faster than the first operation in this instance?

Answer: No; we had two more things there. That was shortage of materials. So it probably took longer than the [485] first one.

Question: And what about when you reached the erection of the third boiler?

Answer: Well, the third boiler, I would say about the same as the second.

Question: And both of them, then, took longer, actually, to construct than the first one?

Answer: That is right. In other words, we had our wall headers up for the third boiler as well, but we wanted No. 2 finished so we took the water wall header off of three and put it back on two. We spent that time on erecting the water wall header.

Question: Were you using approximately the same number of laborers and construction men on

(Deposition of Emil Nelson.)

the erection of boilers two and three as you did on No. 1?

“Mr. Anderson: Objected to as without foundation, and not the best evidence.”

The Court: He may answer. It, perhaps, is not the best evidence as to the number of men working, but he may answer.

Answer: Yes, sir.

Mr. Watts: You may take the witness. That is all of the direct examination.

Mr. Gibson: I will withhold this cross examination, with the Court's permission. [486]

The Court: Very well. You may do that, Mr. Gibson.

Mr. Watts: I will now read the deposition, if I may, of Mr. Hobbs, James A. Hobbs. This was taken on the 28th day of January, 1947, and the direct examination was by myself.

DEPOSITION OF JAMES A. HOBBS

a witness on behalf of plaintiff, having been duly sworn, testified and deposed as follows:

Direct Examination

By Mr. Watts:

Question: State your name, please, sir.

Answer: James A. Hobbs.

Question: What is your residence?

Answer: 10306 Norledge, Kansas City, Missouri.

Question: What is your trade?

Answer: Boilermaker.

(Deposition of James A. Hobbs.)

Question: How long have you been in that trade? Answer: Twenty-seven years.

Question: In the period from about July 15th, 1944, until December 19th, 1944, where and by whom were you employed, and in what capacity?

Answer: I was employed by the Power Service Company, Minneapolis, at the Sunflower Ordnance Plant, DeSoto, Kansas, [487] a boilermaker superintendent.

Question: Your wage rate during that period of time was how much?

Answer: Eighty dollars a week.

Question: Particularly during the period November 10th, 1944, to December 19th, 1944, was the rate eighty dollars a week?

Answer: Yes, but that doesn't include the overtime, you understand that. It was a forty hour week.

Question: Did you work every week during that period of time? Answer: Yes.

Question: All the time except Sundays?

Answer: I went hunting one week. I was off one week.

Question: Now, are you now, or have you ever been, a stockholder or an officer of the Power Service Corporation? Answer: No.

Question: Generally, did you know what time limit was put upon the performance of that contract at DeSoto, Kansas, in 1944, as far as Power Service Corporation was concerned?

(Deposition of James A. Hobbs.)

Answer: My understanding was from what they told me, one hundred twenty days.

Question: Now, state whether or not any shortages developed during the construction of that contract, or that job, so far as materials are concerned. [488]

Answer: You want all the material?

Question: Whether or not any shortages appeared?

Answer: Yes, we knew that when we started the job, or at least, I knew that the side wall tubes for the three boilers was not there.

Question: In other words, can you give me the date when you started to work there?

Answer: To the best of my knowledge, it was July 12th.

Question: And at that time then did you know that the side wall tubes were missing?

Answer: I did.

Question: Now, what was the effect of these shortages upon the performance of the contract out there? What resulted?

Answer: The effects on the job so far as the shortage of the wall tubes were concerned was that we put the first boiler up to a certain point where we couldn't go any further without the wall tubes. We went ahead the best we could, made as much progress as we could, but we got stopped cold on the boiler because of the tubes, and moved on to the next boiler.

(Deposition of James A. Hobbs.)

Question: Well, do you remember what kind of tubes it was that caused this first delay?

Answer: Boiler side wall tubes, that is the name of them, "water-wall tubes."

Question: Now, did you run into any errors in fabrication [489] during the performance of **that** contract?

Answer: We did.

Question: Tell what they were.

Answer: The first error we run into in fabrication was on the,—I am not positive whether it was the first or second boiler. It was the top front wall header apparently had been fabricated for another job altogether. The header was the same length but it absolutely wouldn't fit in the picture at all on the job, and they had to send it back to the Combustion Engineering Company's fabrication shop, and as I understand, used another header.

Question: Tell me why it wouldn't fit on this particular job.

Answer: Because the header was fabricated for a thirty-six front wall tube boiler, and this was a forty-eight front tube water-wall.

Question: In other words, it had more holes in it?

Answer: It didn't have enough holes in it.

Question: What other defective fabrication did you run into, if any?

Answer: On the second boiler after we got the side walls erected and the front walls erected so that it was practically impossible, so to speak, to take the headers out, we found that the holes were

(Deposition of James A. Hobbs.)

three and a half inch holes on the bottom circulator tubes, known as the bottom riser tubes, the tubes, to [490] be exact, coming out of the mud drum going into the bottom side-wall header, that they were three and a half inch holes instead of three inch. Then they had to get swedge nipples and roll into the headers and they had to get a certified welder there to make the welds on the tubes, which meant quite a lot of extra work and delay.

Question: How about delay?

Answer: Which delay?

Question: What was the effect so far as delay was concerned of this header that was improperly manufactured with only thirty-six holes?

The Court: Was this the matter, Mr. Watts, that was referred to earlier in the trial, that the plaintiff was paid for?

Mr. Gibson: He was paid for all of this work.

Mr. Watts: They were paid, I think \$114.00 for this work.

Mr. Gibson: It was only one day's delay.

The Court: You may go ahead. You might as well read the answer.

Answer: The result was that,—the top wall header has to do with the alignment of the whole boiler, and we found after we had lined up the boiler to this header it meant quite a job to take this header down and lose the alignment which we [491] had to put back when we got the other header back. Without this header you can't align the boiler.

(Deposition of James A. Hobbs.)

Question: Have you any recollection as to how long you were delayed on account of this header?

Answer: I kept no records, and have no idea how long the delay was.

Question: Do you recall whether or not there were any roof tubes improperly manufactured?

Answer: Yes; there were two roof tubes on each boiler improperly bent which we had to refabricate on the job.

Question: Did you discover any defective tubes as you went along? Answer: No.

Question: As a result of these delays what happened to the normal sequence of your performance?

Answer: Well, the normal procedure of building a boiler we had to get away from, because we would have to take men off and put them some place else and carry on with the job. Although we were delayed in a certain place, then we had to. —there is lost time and lost motion when you can't carry on the erection of a boiler under the proper sequence. That is all there is to it.

Question: Suppose you give me an example of what you mean by the ordinary sequence that is customarily followed in the [492] erection of these boilers, and what sequence was actually followed in this instance. Give me one or two or three examples, if you can, of a difference in sequence.

Answer: Well, it was a case of, we will say, for instance, a spinning gang, rolling gang. We usually start out on the generator tubes, which means the connection between the two drums. Then we move

(Deposition of James A. Hobbs.)

on to the water-walls, then to the riser tubes, and so forth, and we try to carry out, if we have got more than one boiler, we try to carry out the same gang from one boiler to do the same job on the second boiler, and the third boiler, which is the usual procedure. On those jobs we didn't do it. When we come to the place where we had to have side-wall tubes we got stopped in our tracks. We simply had to take the gang off and put them somewhere else.

Question: State whether or not there would be any lost time between moving from one job to another as a result of these delays?

Answer: I would say there is always lost time where you can't carry out the usual erection procedure.

Question: What happened with respect to the equipment that you used in this erection?

Answer: You mean so far as lost time? You mean of delay, of not operating the equipment?

Question: So far as having to tear it down and set it up again. [493]

Answer: There would be some loss there; not a whole lot.

Question: Now, as a result of all these delays taken as a whole, and taking into consideration shifting from one job to another, and the shifting of equipment from one job to another, state whether or not in your opinion it took more man-hours to perform each one of these operations than it ordinarily takes when normal sequence of operations is followed.

(Deposition of James A. Hobbs.)

Answer: Well, we couldn't carry out the usual procedure of erection, and you are bound to have lost time, lost motion. My opinion is yes, that you have delays.

Mr. Watts: That is all of the direct examination. Now, I will re-offer in evidence Exhibit 67, which is a certified copy of the Income Tax Return of the corporation.

(Whereupon document referred to was marked Plaintiff's Exhibit 67, for purposes of identification.)

Mr. Gibson: I object to it as incompetent, irrelevant and immaterial.

The Court: You have the testimony in here. I don't see that the tax statement would help the Court any.

Mr. Gibson: I will continue with the cross examination. We are now about the middle of page thirty-seven, the beginning of the cross examination.

Cross Examination

Question: Mr. Hobbs, you did the work as rapidly as you [494] could under the circumstances, didn't you?

A. Yes, sir. I would say that there was nice progress made on the job. I mean what we had to contend with. There was delays on account of materials.

Question: Were you formerly employed by Cory, Joslin & Macnsons Company?

(Deposition of James A. Hobbs.)

Answer: Yes, sir.

Question: Were a number of your forces employed at Sunflower for the Service,—for the Power Service Company also employed by Cory, Joslin & Macnsons on boiler erection work?

Answer: Some of the men worked for me on the Power Service job that worked for me when I worked for Cory, Joslin & Macnsons; yes.

Question: All of the men in your forces were familiar with all types of boiler construction, boiler erection? Answer: Yes.

Question: In an erection job of three boilers, isn't it frequently a fact that you have to move from one boiler to the other in order to accomplish a certain part of the work?

Answer: Yes; that is a fact. You don't start on any one thing and carry right on through. We go back and,—

Question: In other words, that is the normal procedure in erecting a boiler under normal conditions? [495]

A. The normal procedure,—you mean when we go from one boiler to the other and go back?

Question: Yes.

Answer: We have to do that in a number of cases; yes.

Question: Now, if these boilers were to be erected simultaneously, that is all three of them, operations on all three boilers at the same time, would you, or would you not, have erection equipment such as hoists, tube-rolling equipment and universal

(Deposition of James A. Hobbs.)

joints at each boiler, if you were working on each boiler at the same time, all three boilers?

Answer: Well, up to now I have never worked on a job where we did all three boilers at one time and finished them up at the same time.

Question: If you were carrying on your operations, I don't say necessarily finishing the boilers at one time, but if you were carrying on operations on all three boilers at one time, would it, or would it not, be necessary that you have erection equipment at each boiler? Answer: Absolutely.

Question: Then, if that is true, and you had sufficient erection equipment located to carry on erection of the three boilers at the same time, would it be necessary to move equipment from boiler to boiler?

Answer: I don't,—let's have it again. I have lost you some place. [496]

Mr. Gibson: Mr. Costolow, who was representing the District Attorney's office made the request that the Reporter read the question. Whereupon the Reporter read the following question: "Question: If you were carrying on your operations, I don't say necessarily finishing the boilers at one time, but if you were carrying on operations on all three boilers at one time, would it, or would it not, be necessary that you have erection equipment at each boiler?"

Answer: I don't know whether it is a necessity,—we do it. I have never,—I have never been on a job just exactly where we had enough equipment to,

(Deposition of James A. Hobbs.)

—that is, a thing I won't say, that a man would have to, but through my experience we have always,—I have never been in a place where we had that much equipment, if you put it that way.

Question: Then it is a normal condition on any boiler erection job where there are three boilers that you have to move equipment occasionally from one boiler to the other?

Answer: That is a fact; yes.

Mr. Gibson: And that is all of the cross examination. [497]

GEORGE EDWARD BENSON,

a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Watts:

Mr. Watts: The purpose of this testimony is to amplify some testimony heretofore offered as to the measure of damages.

Q. Will you state your name?

A. George Edward Benson.

Q. What is your address, Mr. Benson?

A. 608 Hearst Building, and 442 Cumberland Road.

Q. And your occupation is what?

A. Certified Public Accountant.

Q. You are a Certified Public Accountant?

A. Yes.

(Testimony of George Edward Benson.)

Q. Are you a graduate of any university, or universities? A. Yes.

Q. Of what universities are you a graduate?

A. The University of Illinois. [498]

Q. Of what professional societies are you a member?

A. The American Institute of Certified Public Accountants, and the State Society of California.

Q. Are you practicing your profession in California? A. Yes, sir.

Q. And have been for some time?

A. Yes, sir.

The Court: I imagine that is a sufficient qualification, is it not, gentlemen?

Mr. Gibson: We will admit his qualifications.

Mr. Scholz: Yes; I will admit them.

Q. (Mr. Watts, continuing:) Of what firm are you a member, or associated with?

A. Benson & Neff.

Q. Prior to yesterday, Mr. Benson, were you acquainted with Mr. Borst, or with anybody connected with the Power Service Corporation?

A. No; I was not.

Q. Did you ever see Mr. Borst before yesterday?

A. No, sir.

Q. Are you acquainted with the accounting methods used in the construction business?

A. Yes.

Q. That is, the methods used by construction contractors? [499] A. I am.

Q. Have you handled accounting of that kind?

(Testimony of George Edward Benson.)

A. Yes, sir; I have.

Q. Let me ask you: Is it considered sound practice to allocate the amount of office overhead to the various company activities on some fair basis?

Mr. Gibson: We object to that as incompetent, irrelevant and immaterial.

The Court: I think to save time I will permit him to answer.

A. It is.

Q. (Mr. Watts, continuing:) Will you name some of the methods that are considered as sound practice in allocating the overhead expense?

A. The amount is allocated on the basis of direct labor, the labor man-hours; and another method is to allocate the overhead on a basis of direct labor costs; and in the manufacturing business, the overhead is sometimes allocated on the basis of machine-hours; however, that is not used in this sort of business.

Q. Is it considered sound practice to use the average number of employees on the jobs in allocating the overhead?

A. That is what I mentioned as the labor-hours, or man-hours. We reach the same result. [500]

Q. Mr. Benson, assuming now that the plaintiff company here during the period between November 10th, 1944, and December 19th, 1944, had in progress three contracts, which were as follows: First, the contract with the defendant W. E. Joslin at the Sunflower Ordnance Works, the contract price of that particular contract being \$466,821.07, and

(Testimony of George Edward Benson.)

that the average number of employees engaged in the performance of this contract during the period stated to you, November 10th, 1944, to December 19th, 1944, was eighty-nine; and assuming that the second contract in progress was with the Board of Heating Commissioners of Sleepy Eye, Minnesota, and that the total price of this contract was \$15,-956.00, and that the average number of employees on this contract during the time mentioned was four; and assuming that the third contract was with the Union Pacific Railroad Company at Salt Lake City, Utah, the total price of that contract being \$80,740.00, and that the average number of employees engaged in the performance of this contract during the time mentioned was eighteen; and assuming also that the normal annual overhead of the plaintiff company was \$75,316.58, what, in your opinion, would be a fair and reasonable allocation of plaintiff's overhead to the contract with the defendant for the period between November 10th, 1944, and December 19th, 1944, by using the average number of employees as a basis? [501]

A. \$6,452.52.

Q. Will you describe the method you have used in arriving at this sum, and state whether or not in your opinion that method is recognized as standard accounting procedure?

A. The annual overhead of \$75,316.58, which I understand to be constant throughout the year, is first allocated to the period of thirty-nine days, by multiplying thirty-nine over three hundred and

(Testimony of George Edward Benson.)

sixty-five, and that result is in turn multiplied by eighty-nine over one hundred eleven, eighty-nine being the number, or, rather, average number of men employed on the Joslin contract during the thirty-nine day period, and one hundred and eleven being the average number of men employed on all of the contracts during that period.

Q. Is that a recognized method of allocation of the overhead?

A. That is a recognized method of allocation of overhead.

Q. And by using that method you arrive at what? A. \$6,452.52.

Q. State whether or not that is a reasonable method to use in arriving at a fair overhead allocation to this contract during the thirty-nine day period? A. Yes, it is.

Mr. Watts: You may take the witness. [502]

Cross Examination

By Mr. Gibson:

Q. Mr. Benson, you used the total amount of the contract price on the Joslin contract as reported to you by the plaintiff, or by Mr. Watts, as \$466,-821.07?

A. Well, that factor is used, and it comes to eighty-three and one-half per cent of the contracts in progress at that time, that is, it was so close to that eighty-three and one-half per cent that I used that figure.

Q. You used what was reported to you as the total overhead for the twelve months period for this company? A. Yes, sir.

(Testimony of George Edward Benson.)

Q. And then broke it down on the basis of number of days on this job? A. That is correct.

Q. That was reported to you as between November 10th and December 19th, 1944?

A. That is right.

Q. And you also used the number, or average number of employees that was reported to you?

A. Yes, sir.

Q. And that gave you the balance factor to divide into the \$75,316.00 which was reported to you as annual overhead?

A. The overhead portion of the \$75,316.58 was taken for the thirty-nine days, and that result was pro-rated on the basis [503] of the average number of employees.

Q. And in determining the overhead, you do not purport to know what factors went into the overhead, or the arrival at the figure of the overhead of \$75,316.00?

A. No, sir; I don't. That is correct.

Q. Suppose that the project manager was supervising the construction job, would you consider that amount would be part of the overhead, or production cost?

A. Ordinarily, it would be charged to production cost.

Q. And supposing that he acted in the capacity of salesman for the company a part of the time in the home office, and a part of the time on sales work, and a part of the time in direct charge of operation in the field, would it be good practice to

(Testimony of George Edward Benson.)

try and arrive at a fair estimate of time divided to the various activities and to allocate them?

A. That depends on the circumstances. In some organizations they might allocate as overhead, and in some allocations they may not.

Q. A paid salesman is distinguished from a commission salesman and is considered as overhead operation?

A. That is right.

Mr. Gibson: I believe that is all.

Mr. Watts: That is all. Thank you very much, Mr. Benson. [504]

W. LYLE BORST,

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Further Direct Examination

By Mr. Watts:

Q. Mr. Borst, since the commencement of the trial of this case have you received in the mail a printed compilation of the rental rates for construction equipment?

A. Yes, I have.

Q. I hand you now exhibit No. 70, and I will ask you to identify this for the record, if you please.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 70, for purposes of identification.)

A. This is a compilation of the office of Price Administration Maximum Price Regulations 134 to 136.

Mr. Watts: I request now that counsel for the

(Testimony of W. Lyle Borst.)

defendant and the Court turn to page 136 of the trial brief filed in this case for the purpose of comparing the costs, or the amounts charged by the plaintiff, in the schedule of the computation of damages with Exhibit No. 70.

Q. (Mr. Watts, continuing:) Will you tell the Court from page twenty-six of Exhibit No. 70 of the computation,—of the compilation of rental rates of the Office of Price Administration,—

Mr. Gibson (Interposing): What is Exhibit No. 70? [505]

Mr. Watts: It is the list, or compilation of ceiling prices of rental of equipment, and the purpose is to show that our prices were the same, or lower than the ceiling price which was in effect at that time.

The Court: Of course this matter would be such a matter that would be taken notice of by the Court. The Court would take judicial notice of this, and I presume the only reason it would be introduced would be for the convenience of the Court. It would be the same as introducing a statute to show what the law is. I will admit it in evidence, simply for that purpose, only to have it in the record for the convenience of the Court, in order that he may, if he desires, check the ceiling prices with the evidence introduced. Certainly, I can see no purpose of going over this item by item.

Mr. Gibson: That is true. That is just the same as offering a law book for the Court.

The Court: Yes; I think that is right, but it may be of some help. In fact, it may be of con-

(Testimony of W. Lyle Borst.)

siderable help to the Court. It may be admitted.

(Whereupon Plaintiff's Exhibit No. 70, for identification, was admitted in evidence.)

Mr. Watts: You may cross examine.

Cross Examination

By Mr. Scholz: [506]

Q. We have a great deal of evidence before the Court here, Mr. Borst, now just to get the facts straight, as I understand it, I understand at this time that you are suing,—I mean the Power Service Corporation is suing for breach of contract dated July 11th, 1944?

A. The final contract is dated, I think, September 7th.

Mr. Watts: I believe it is in evidence as Exhibit 2? A. Yes, sir.

Q. (Mr. Scholz, continuing:) For the purpose of refreshing your memory, I hand you Exhibit No. 2.

Mr. Watts: We will admit, if that is what counsel wants, that the contract is dated July 11th. It shows it is dated July 11th.

Mr. Scholz: That is what I said.

Q. (Mr. Scholz, continuing:) Plaintiff is suing the defendant for a breach of that contract, is that correct? A. Yes.

Q. And that breach is based on the fact, or on the alleged fact that this agreement states, or should have stated, that all essential or necessary materials for the erection of Power House No. 1 was stored on the project before you made your bid?

No. 11992

United States
Court of Appeals
for the Ninth Circuit

POWER SERVICE CORPORATION,
a Corporation,

Appellant,

vs.

W. E. JOSLIN, doing business as CORY-JOSLIN
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Transcript of Record

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(Testimony of W. Lyle Borst.)

Mr. Watts: That is objected to as calling for a conclusion of the witness. It calls for a legal conclusion. [507]

The Court: He may answer, subject to your objection.

Q. That breach is as I have stated, on the alleged fact that the agreement stated that all of the materials was in storage before you made your bid?

A. We interpreted the specifications to be that all basic material was on the site.

Q. When you made your bid, which was on that date,—you interpreted this contract to state that all of the essential necessary materials for the erection of Power House No. 1 was on the site?

A. That is right.

Q. Now, Mr. Borst, can you point out in this contract where that was stated, or the clause from which you made this interpretation?

A. The clause showed,—I will say this: The general idea was advanced that nearly all of the materials were stored on the site. That was advanced by certain clauses in the contract.

Q. The general idea was advanced that nearly all of the materials,—you mean there was a clause in the contract that says “nearly all of the materials” were stored on the site? A. Yes, sir.

Q. And that is what you based your statement on? A. Yes. [508]

Q. Is there anything else in the contract on which you base that statement?

A. Not with respect to the materials.

(Testimony of W. Lyle Borst.)

Q. Now this contract dated July 11th, 1944—strike that please, Mr. Reporter. You made a bid on the specifications which are a part of the contract on July 8th, 1944?

A. That is right.

Q. Prior to making this bid you received specifications which are a part of this contract?

A. Yes, sir.

Q. And you had this contract—or these specifications in your hands on June 17th, 1944?

A. I don't think that we got them on that particular date, but it was shortly thereafter.

Q. Did you not testify that you received the specifications on June 17th, 1944?

A. I had forgotten the date of the letter that we received at the time we went to Kansas City, but the date was established at that point, I believe.

Q. I think you testified that you received a phone call? A. Yes.

Q. You received a phone call about June 16th asking if you wanted to make a bid, and the specifications were mailed in Kansas City on June 15th?

A. As I remember it, we went to Kansas City and picked up the specifications.

Q. You read the specifications over thoroughly?

A. Yes, sir.

Q. And there was nothing in these specifications that you misunderstood?

A. No, I didn't misunderstand them.

Q. You know that the specifications called for

(Testimony of W. Lyle Borst.)

you to make a check—a physical check of all of the property and to base your bid upon that?

A. The specifications gave an opportunity for an inspection of the works.

Q. Now, Mr. Borst, that was approximately three weeks before you submitted your bid, from June 17th to July 8th, was about three weeks?

A. I think the actual time that these specifications came out, that it was considerably later than that, the actual time the specifications came out—yes, it was later. The fact of the matter is that the blue prints which are a part of the exhibit were not available at the start of the job.

Q. That is true, but the contract provides that the blue prints may be submitted later. I am talking about the specifications. [510]

A. I am very definite that we didn't have that much time to prepare that bid. It may not be all-important, but I know that we only had a week or ten days at the most.

Q. The best of your recollection is, Mr. Borst, that you received the telephone call about June 15th, or 16th, and you went to Kansas City and obtained the specifications?

A. There was some days between those points.

Q. Well, that was approximately June the 17th?

A. I think it was later than that.

Q. Did your counsel make a proposed statement of fact that there was a telephone request as to whether you wanted to make a bid, and that being

(Testimony of W. Lyle Borst.)

on July 17th, when Colonel Taylor contacted the vice-president of the corporation, and that you, the chief engineer, and two other employees of the plaintiff immediately got on the train and went to Kansas City, and that you went to the office of the A-E-M and obtained a copy of the specifications about June 17th?

A. We went to Kansas City after the letter was received—shortly after the letter was received. I would say that it was probably the first of the following week, whatever that would have been.

Q. And you took two other employees with you when you went to Kansas City? A. Yes, sir.

Q. And then, Mr. Borst, as soon as you received the specifications [511] you started to make a physical check of the project to see what you were going to base your bid on?

A. That is right.

Q. Who were these two men that went with you?

A. Mr. H. E. Brockhoff and Mr. M. D. Forkey.

Q. Mr. Hobbs was the boiler superintendent of the plaintiff corporation? A. Yes.

Q. He was not with you at that time?

A. No, sir; he wasn't.

Q. Now, Mr. Borst, in accordance with the specifications you started to check and see what bid you would make? A. Yes, sir.

Q. You spent approximately two days, or parts of two days making this check?

A. We were there parts of two days.

(Testimony of W. Lyle Borst.)

Q. In making these checks? A. Yes.

Q. And then you went back to the home office and then submitted your bid? A. Yes, sir.

Q. You didn't make any further check than that?

A. No, sir; that was the arrangement.

Q. And then the bid which you submitted, which was plaintiff's [512] exhibit 1-C, I believe, was submitted on July 8th, 1944? A. Yes, sir.

Q. And you read over this bid and were thoroughly familiar with it? A. Yes, sir.

Q. Along with the bid which had a mimeographed form with typewritten insertions in it, and your name, and the sum of the bid written in ink, you appended a pamphlet concerning the Power Service Corporation? A. That is right.

Q. Which included a statement of the contracts awarded to you before? A. That is right.

Q. And the purpose of that was to inform the contractor of your background?

A. That is right.

Q. And the pamphlet stated that the company owned sufficient equipment to fulfill any obligation which it undertakes? A. That is right.

Q. Did you intend that the contractor would rely upon that statement?

A. That bulletin applies to the Fegels Construction [513] Company and the Power Service Corporation.

Q. But they are alter egos of each other?

(Testimony of W. Lyle Borst.)

A. Well, we have facilities to draw on from one company to the other.

Q. This does not differentiate at all between the Power Service Corporation and the Fegels Construction Company?

A. Not in the bulletin.

Q. Now, Mr. Borst, while we are on the subject on this bid, the bid was signed by yourself?

A. Yes, sir; I think it was.

Q. On behalf of the Power Service Corporation?

A. Yes, sir.

Q. It specifies over your signature that performance will begin within five after receipt of notice to proceed. That is in paragraph 1-05 of the specifications?

A. Yes, sir.

Q. You understood that?

A. Yes, sir.

Q. There was no misunderstanding, or no interpretation that it was any different than in the specifications, which was a part of your contract?

A. No.

Q. You understood that paragraph 1-05?

A. Yes, sir.

Q. And you understood by that that you would accept any [514] additional time—I will read this: It is clause (e): “In case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the subcontractor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered, and

(Testimony of W. Lyle Borst.)

the constructor will not be liable for any costs or expenses incurred by the subconstructor as a result of the increased time for completion of the sub-contract."

A. That was a part of the original mimeographed form, I believe.

Q. Now then, Mr. Borst, up to the time that you made your bid, which was on July 8th, there was no misunderstanding or mix-up or mistake by anyone, was there?

Mr. Watts: That is objected to as calling for a conclusion.

The Court: He may answer.

A. We were relying entirely on the specifications.

Q. (Mr. Scholz, continuing:) Up to that time, that is, the time of your bid, and the time it was accepted, which was on July 10th — strike that please. You received instructions to proceed with the contract on July 13th? A. Yes, sir.

Q. Up to that time there was no mistake or no misrepresentation [515] by anyone, or anything said to you by anyone which caused you to put any different construction upon this contract which you had accepted by your bid?

A. On the twelfth, that was the day I learned from Major Matthews that there would be a shortage of important materials.

Q. On July 12th Major Matthews stated there was a shortage of materials? A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. Did you have any information—strike that. You knew prior to July 12th that there was a shortage of materials?

A. We knew there would be a shortage of minor materials.

Q. As a matter of fact—you said there was a shortage of minor materials? A. Yes.

Q. You based that on the statement contained in the specifications that “nearly all” of the materials were there?

A. Yes, sir; that is right.

Q. And then it was your conclusion that that meant merely minor materials?

A. That was the interpretation of all of us who prepared the bid.

Q. Isn't it true that on contracts of this kind you base the cost amount—if there is a percentage of materials missing you base it on the value of that material? [516]

A. The value of material that might have been missing?

Q. Yes; if there are materials missing, we will say, of one per cent, or five per cent, you take that one per cent or five per cent from the total value of all materials? A. Yes, sir.

Q. And that is the usual construction practice, is it not? A. Yes.

Q. There was a million one hundred forty-five thousand dollars of this material?

A. That is right.

(Testimony of W. Lyle Borst.)

Q. That was the material installed?

A. That was the value of the material for this plant.

Q. That is the value of the material that you were going to install under your contract?

A. I understood the value of the materials purchased by Hercules Powder Company for this project was that amount.

Q. And there was an additional amount of money for materials above that which went into this contract?

A. My understanding was that this represented the total cost of the material that ultimately went into the plant.

Q. That was your understanding?

A. That was my understanding.

Q. And the actual materials short was less than one and one-half per cent of that amount? [517]

A. There is evidence that has been submitted here as to the shortage.

Q. Would you answer my question?

A. That is not the value of the missing material.

Q. What was the value of the missing material?

A. It was considerably in excess of that.

Q. What was the value of the missing materials? We have the total value now. Tell us, Mr. Borst, what was the value of the material that was missing.

A. We have not established that.

(Testimony of W. Lyle Borst.)

Q. You never figured that?

A. All the material found missing which we requisitioned which was supplied and which caused us no delay, that was not valued in money.

Q. Now, Mr. Borst, I read to you from your Exhibit No. 44 as follows: Paragraph seven of that exhibit, "Information obtained from Hercules Powder Company has disclosed that the total value of equipment procured for the power house was approximately \$1,145,000.00. Such information also disclosed the number of water-wall tubes required for each boiler to be as follows," and then I will skip a part in here, and it reads again in the same paragraph, "the total estimated value of the missing tubes is \$14,208.00." That is just a portion of the exhibit which I read, and then, Mr. Borst, in the letter [518] of the Chief Engineer dated March 12th, 1946, which is Plaintiff's Exhibit No. 45, it states as follows, in the third paragraph of the letter, "It appears from the records that the total value of equipment procured for the work to be performed under your contract was \$1,145,000.00, and that the estimated value of the missing equipment was \$14,208.00, approximately one and two-tenths per cent."

A. I would be glad to clarify that. These materials that I referred to in that percentage is representative cost of the water-wall tubes with respect to the installation material costs, but they do not take into account the multitude of materials

(Testimony of W. Lyle Borst.)

furnished which was short in the nature of pipe, bolts, nuts, flanges, and things of that kind.

The Court: I think we will recess at this time until two o'clock.

2:00 p.m., March 25, 1947

Q. Now, there is no question about there being bolts, nuts and things of that kind short?

A. There was a general classification of material which included valves, flanges and items which were obtainable from the area.

Q. They are right there on the site?

A. Yes, sir. [519]

Q. And it was a matter of an hour or so before you could have them?

A. Well, they were there on the site. It may be longer than that.

Q. But that has nothing to do with your claim which is before the Court now?

A. That is right.

Q. And we can disregard that?

A. Except that it is a part of the material which fills the blank between "nearly" and "all."

Q. But the material was not missing, but was not present at power house No. 1?

A. It was not available without a formal requisition.

Q. But the only concern is the alleged breach of contract by Mr. Joslin in regard to the tubes and headers? A. That is right.

Q. Did you make an inquiry—I mean by you, did the Power Service Corporation make an in-

(Testimony of W. Lyle Borst.)

quiry of Mr. Joslin, or his agents or representatives, in regard to those tubes and headers before you submitted your bid?

A. No, sir; I did not.

Q. Did you ever make inquiry of Mr. Joslin, or his agents or representatives, in regard to the tubes and headers as missing, that were missing at any time after you submitted your bid? [520]

A. As soon as it became—that is, as soon as I became advised by Major Matthews I discussed it immediately with Mr. Wedlick and Mr. Jung.

Q. At that interview with Mr. Wedlick you informed him that the tubes and headers were missing?

A. The tubes, at that time.

Q. That the tubes were missing?

A. Yes, sir.

Q. That is the first time you discussed it with the defendant, or any of his agents?

A. That is right.

Q. What date was that?

A. The fourteenth of July.

Q. The fourteenth of July? A. Yes, sir.

Q. So there was no mistake, or misrepresentation that occurred up to the time that you were ordered to proceed on July 13th?

A. Up to that time everything seemed to be in order.

Q. And now, no misrepresentations were ever made to the Power Service Corporation with respect to the tubes or headers being, or not being, on the site prior to your conference with Major Matthews?

(Testimony of W. Lyle Borst.)

A. That is the first—nothing prior to that conference.

Q. Therefore, as I understand, your alleged breach of [521] contract is the failure of Mr. Joslin to furnish tubes and headers when you required them; is that correct? A. Yes, sir.

Q. You depended on this clause 5-04(c) as a basis for whatever damage you may be able to prove, which clause says that “nearly all” of the materials are there?

A. That, and the fact that the materials that were there were not proper.

Q. That, and the fact that some of the materials you had to refinish?

A. There was the case of the header on No. 2 boiler that had to be refurnished entirely new from the original supplier, and also the improper header requiring tubes to be revamped by the use of swedge nipples. There were also other tubes that were improper and had to be resupplied new.

The Court: That still confines it to the water-wall tubes and the headers?

A. That is right, sir.

Q. Now, Mr. Borst, is it your understanding that on acceptance—that the general custom is that when a bid is made and that bid accepted that is a contract?

A. Depending on the exact documents, that is, the terms of the documents themselves.

Q. You may be correct, Mr. Borst. In this particular case [522] when you submitted your bid

(Testimony of W. Lyle Borst.)

and had it accepted, did you think that you had a contract or not?

A. We felt that we had in effect. There was the letter to proceed, and our intent to proceed, which would be sufficient until the contract itself was executed.

Q. You didn't consider that a definite contract?

A. No, these specifications provided — under these specifications, Mr. Scholz, the contract document said that it would not be a definite contract until it was fully approved.

Mr. Watts: That is in specification 1-29.

Q. (Mr. Scholz, continuing:) In other words, so that I will clearly understand you, Mr. Borst, you felt that when you got the order to proceed, and your bid had been accepted, you didn't have a definite contract until it was approved by the contracting officer? A. That is right.

Q. That was your understanding?

A. That is right.

Q. And also by the A-E-M?

A. That is correct.

Q. And in that connection you are referring to clause 1-29 of the specifications? A. Yes, sir.

Q. Now, Mr. Borst, as far as—let us refer back a couple [523] of questions—you said you also relied on defective material. Did you read section 5-04 of the specifications, that, is 5-04(c) on page 1-23 of the specifications which reads as follows, in part: "Materials, equipment and machinery which have been broken, or otherwise damaged beyond use, or

(Testimony of W. Lyle Borst.)

repair, during storage, or which have inherent defects in manufacture, or material, caused through no fault or negligence of the subconstructor will be replaced by the constructor without cost to the subconstructor." Did you have that in mind at that time?

A. Not that would be damaged. This was incorrect fabrication. This was an inherent defect, and not by reason of any storage or any subsequent moves.

Q. And it was not considered damaged or broken beyond use?

A. No, sir; it was absolutely improper material.

Q. Now, Mr. Borst, did you allege that there was any mistake in the drawing of this instrument?

A. Yes, sir. I don't think that it spoke the facts.

Q. You allege that the defendant made a mistake in drawing this instrument?

A. In effect, yes.

Q. What do you mean by that?

A. The instrument was prepared by others. He simply used [524] it and tendered it to the bidders.

Q. You allege—

A. (Interposing:) It was tendered to the bidders by the A-E-M for Joslin.

Q. You don't contend that Mr. Joslin made any mistake in drawing it up personally, or his company, or his agents or representatives?

A. It was an error in preparing the papers—no doubt, it was an error.

(Testimony of W. Lyle Borst.)

Q. And you alleged the error?

A. Alleged the error in drawing the specifications. No doubt that was done by parties other than Cory, Joslin, although they did have to approve—and they did, no doubt, approve them in effect.

Q. That is your conclusion. Maybe I asked for it.

A. I felt that he approved it in that he was satisfied with it and tendered it with his request for bids.

Q. You don't contend that Mr. Joslin, or anybody in his organization, made the mistake?

A. No; I don't contend that. I don't feel that it was something definite that they were a party to.

Q. But you do contend that you didn't—you do contend that any reasonable diligence on your part from June 17th to July 8th would not have disclosed any shortage in material? [525]

A. I truly feel that, and I can state definitely that all diligence was given to it by myself and by my people, my direct subordinates, and it would have been physically impossible to have made any determination unless one would have employed fifty men and worked night and day for the period that we were there prior to making the bid, to become aware of the situation with respect to the missing tubes.

Q. You testify, do you, Mr. Borst, that you used all possible diligence? A. Yes, sir.

Q. I believe you testified that you took two men and worked a part of two days. Do you consider that as being all possible diligence.

(Testimony of W. Lyle Borst.)

A. Yes, sir; I feel that we made a summary of the situation as comprehensive as could have been made, unless one had started in before making the bid to make a count by count check, and that would have meant re-stacking and checking hundreds of tons of material from one spot to another, because the type of material we were dealing with at that place and at that time was piled in tiers and stacks and layers, and to make a determination of that kind it would have been necessary to unpile all of this great mass of material to get to the bottom.

Q. And yet you were bidding on this project under these specifications that you had to make a complete physical check [526] of the materials?

A. That physical check was for the determination of the status of the work.

Q. I am not talking of the status of the work, or the material. I am talking about the physical check; before you made your bid you were to make a physical check and to see what the situation was?

A. Yes, it was necessary for the contractor to determine the status of completion of power house No. 1 so that he could then compute the cost of the work necessary to complete it, by observation of the uncompleted work, and by seeing the status of the power house and by further observing the appearance of the plant itself in its finality as shown by the plan. I think it was Plan No. 3.

Q. This proposed statement of facts which was furnished by counsel, I believe you went over that and you are familiar with it?

(Testimony of W. Lyle Borst.)

A. Yes, sir; I am.

Q. And that states that the plaintiff was required to make a physical inspection before making his bid?

A. That is correct, and we did that.

Q. Now, in this proposed statement of facts, counsel states that by July 26th plaintiff had progressed to the point in the preparation of the field inventory where it appeared certain that there was a major shortage of materials, tubes and headers, [528] that would delay the progress of the work beyond the contract schedule of one hundred twenty days. That is when you first became certain of these shortages?

A. No, sir; I was certain of that by reason of advice from Major Matthews, which was confirmed by everyone down the line.

Mr. Scholz: I think the Court will take notice that "everyone down the line" does not mean anything.

Q. Was it on July 26th that you first notified the defendant of the shortage of tubes and headers? I think that was your Exhibit No. 4, but I am not certain of that.

A. I have a letter, as I remember, in which I pointed out the status of the missing tubes.

Q. That was July 26th, is that correct?

A. I believe so.

Q. And that was in the nature of a requisition for tubes and headers, was it?

A. That was in the nature of a general state-

(Testimony of W. Lyle Borst.)

ment which dealt with the necessity of having the tubes and headers delivered in order to complete the work.

Q. Now, was it—strike that, please. Mr. Borst. it wasn't until August the eighth that you submitted to the defendant a letter which requested that the contract be modified to permit you recourse for any damages that you could prove; is that correct?

Mr. Watts: That was on August the third.

Q. (Mr. Scholz, continuing): I refer to the proposed amendments to the contract,—to this contract, reserving full right to claims for extensions of time, and for reimbursement of such increased costs as may be occasioned by non-availability of the above mentioned materials, referring to the water-wall tubes. A. That is right.

Q. That is the first requested change in the contract, that is, a request for a change in the wording of the contract?

A. We had requested adjustment prior to that time.

Q. But this is the first requested change for the wording of the contract? A. Yes, sir.

Q. And you did that because you felt that under the contract and specifications you could not have any recourse for damages?

A. We were conscious of the writing in the basic specifications, but on realization of the vital materials being short, we endeavored to get the contract negotiated in a satisfactory manner and form before final signature.

(Testimony of W. Lyle Borst.)

Q. This request of August 8th was denied by the defendant? A. That is right.

Q. On August 22nd, I believe you wrote to the defendant, I think your Exhibit No. 16, asking for a claim of reimbursement [529] for increased costs, or an interpretation of the contract allowing an increase in the subcontractor's costs because of delay in delivery of materials,—the subparagraph in the letter is as follows: "An increase in the subcontractor's cost because of delay in delivery of materials, he prosecutes the work without due regard to economy in order to complete as early as possible, or an increase of the period of construction beyond one hundred twenty days for the reason of delayed delivery of materials." Now, you wanted to know if you could do that?

A. That was one of the steps we took, yes, sir.

Q. You asked the defendant to write such a letter? A. Yes.

Q. And the defendant refused to write such a letter? A. That's right.

Q. You did not lose any money on this contract, Mr. Borst?

Mr. Watts: That is objected to as not an issue in this case,—no; I will withdraw the objection, but I do object to the form of the question for the reason that it calls for the fact as to whether there was any profit, and the Court is not concerned with how much we made, or whether we made a profit at all. The question is how much we were damaged, what is the difference between what it would [530] have

(Testimony of W. Lyle Borst.)

cost us if it were performed normally, and what it did cost us.

The Court: The objection is sustained.

Q. (Mr. Scholz, continuing): Now, speaking of damages again, you admit that you are not entitled to damages under this contract except that as provided for in the clause which is appended to the signature page of the contract; is that correct?

A. That would impress the damages of which we are talking.

Q. And if that does not provide for damages you are not entitled to any?

Mr. Watts: That question calls for an answer which would invade the province of the Court.

The Court: I think it is a matter for the Court, in fact, I think this case could, and possibly should have been submitted, on a stipulation of facts, and could have possibly been submitted in about thirty minutes.

Mr. Watts: I did submit a stipulation of facts.

Mr. Scholz: That was practically a stipulation of judgment.

The Court: We are not gaining any time by these remarks or arguments. You gentlemen may proceed.

Q. (Mr. Scholz, continuing): Did you agree to confer any benefit on the defendant, or any one else beside the plaintiff, [531] by that clause which is appended to the signature page of the contract?

Mr. Watts: Objected to as calling for a conclusion of this witness.

(Testimony of W. Lyle Borst.)

The Court: He may answer.

A. The clause was placed on there, Mr. Scholz.

Q. Will you answer my question. Do you recall what it was?

A. Will you repeat it?

Q. Did you confer any benefit, or agree to confer any benefit, on the defendant, or anyone else because of this clause,—by addition of this clause to the contract?

A. Yes, by going forward with the execution of the contract.

Q. The only benefit that you conferred, or agreed to confer, by this addition was going on with the contract?

A. And further, by setting down the pattern by which final adjustment could be made to the contract.

Q. As a matter of fact, at the time of the appending of that clause to the signature page, you had completed practically fifty per cent of the work,—let's be exact in this,—I think it was forty-two per cent of the work?

A. Well, that would show on the progress chart. I don't remember that, exactly. [532]

Q. Well, what is shown on the progress chart, or the construction chart?

A. I referred to the weekly chart which charts the progress of the work.

Q. Will you refer to whatever chart you have there and tell me if it is not true that forty-two per cent of the work was completed at that time?

Mr. Watts: What date do you want?

(Testimony of W. Lyle Borst.)

Mr. Scholz: September fourth.

A. We would at that time be thirty-four per cent complete. That is on September fourth.

Q. (Mr. Scholz, continuing): Now, on September 13th, what per cent was completed?

A. About thirty-nine per cent.

Q. Now then, Mr. Borst, as I understand it, at the time you received your order to proceed you had not signed the contract?

A. The formal signing of the contract was on September 13th,—no; I think September 11th.

Mr. Watts: That is the date it was approved.

Q. (Mr. Scholz, continuing): That is, by the contracting officer?

A. That was the final execution date.

Q. You proceeded with the work up to that time? [533] A. Yes, sir.

Q. And then, of course, you continued after it was signed until you finished it?

A. That is right.

Q. Now, on June 30th, 1945, as I recall it, you claimed under the contract only \$10,008.70 damages; is that correct? A. That is right; yes.

Q. And then,—prior to that time, on February 21st, 1945, you claimed, under the contract, \$9,323.02 damages, of which ten per cent was profit?

A. That is right.

Q. You don't claim a loss of profit any more?

A. No; we are not carrying that.

Q. Now, Mr. Borst, when your bid was accepted that eliminated all of the other bidders?

(Testimony of W. Lyle Borst.)

A. I don't know, sir.

Q. I think you testified that you had a great deal of experience in contracting work,—with contracts of this kind,—you had twenty similar contracts in various states, is that correct?

A. At this time, or previous?

Q. Just previous to this time?

A. Yes, we would have had more than twenty in the company.

Q. Similar contracts? [534]

A. Yes, previous to that time.

Q. Mr. Joslin supplied everything as far as you know; everything as fast as he could and expedited everything to the best of his ability, did he not, after you filed your requisition for the same?

A. I would say yes, that all of the material in the classification of general supplies was furnished us in approved fashion, and in order, that is, in the nature of missing bolts, gaskets, valves, pipes and fittings. I do not know what diligence there was on his part relative to obtaining other materials which were not supplied in time.

Q. What do you mean by "other material?"

A. Well, tubes and headers, or the replacement of tubes and headers, as well.

Q. Mr. Borst, when you filed your bid I think you stated that you didn't know whether the tubes and headers were there?

A. Well, we were not aware at the time we filed our bid that they were missing.

Q. You didn't know whether they were, or were not?

(Testimony of W. Lyle Borst.)

A. We were fully under the impression that they were there.

Q. You were under that impression?

A. Our understanding was that they were there.

The Court: Just state whether you knew whether they were, or were not. [535]

A. When we made our bid, I knew that there was material of a minor character that was missing.

The Court: It seems to me that we have spent much time and have page after page of record here as to the bolts and nuts and pipes. Now, why cannot this be confined to the shortage of tubes and headers?

Q. (Mr. Scholz, continuing): Do you know whether the tubes and headers were there, or not, before you made the bid? Now, that is a simple question.

A. I knew that the boiler tubes, as a whole, and headers and drums, as a whole, were there, but I didn't know that there were some specific items missing.

Q. The defendant at no time represented to you that the tubes and headers were, or were not, there?

A. Not prior to the letting.

Q. I didn't say that. My question was: The defendant at no time represented to you that the tubes and headers were, or were not, there?

A. The defendant agreed shortly after the award that these tubes were not there.

Q. You have reference, by that statement, to the time that Major Matthews told you that he thought

(Testimony of W. Lyle Borst.)

they were missing, and you talked to Mr. Wedlick?

A. Yes, sir. [536]

Q. Did he say that he agreed they were missing? A. Yes; he did.

Q. Do you recall what words he used?

A. Mr. Wedlick and I talked about it, and he said, "I now understand that these materials were not delivered by the Hercules people, and were not on the site."

Q. He obtained that understanding from what you told him?

A. No; I don't think so. He obtained the understanding because it became common knowledge, and he checked for himself through channels to verify the situation.

Q. Those tubes run from three to forty feet in length? A. About forty feet long.

Q. Now, Mr. Borst, this letter referring to the chain of command that the A.-E.-M. wrote to you, the letter is dated July 19th, 1944, written to the Power Service Corporation, attention Mr. W. Lyle Borst, Chief Engineer, and that was offered in evidence.

Mr. Watts: That has not been offered in evidence, Mr. Scholz.

Mr. Scholz: You offered it in evidence as a part of Colonel Taylor's deposition.

Mr. Watts: Of course, I have no objection to your reading it, if you care to. [537]

Mr. Scholz: Very well.

Q. (Mr. Scholz, continuing:) Do you want to

(Testimony of W. Lyle Borst.)

look at a copy? It is a letter dated July 19th, 1944, and I will read it:

“July 19th, 1944

“Power Service Corporation,
Sunflower Ordnance Works,
DeSoto, Kansas.

Attention: Mr. W. Lyle Borst, Chief Engineer.”

The subject of this letter is the contract that is under discussion here.

“Gentlemen:

“This is to advise that the following procedure will be set up to handle your lump sum contract No. 5 under Cory, Joslin & Macnsons:

“1. Cory-Joslin will be responsible for expediting the delivery of all materials in connection with your work.

“2. Cory-Joslin will have charge of the coordination of your work with other crafts.

“3. The Engineering Division of LBG will have charge of the inspection of all work under your contract and will over-see all tests.

“4. The Combustion Engineering Company representatives and representatives of the Hercules Powder Company [538] will issue all instructions to you through the Engineering Division of LBG only.

“5. All changes from drawings or specifications and engineering decisions that may be necessary from time to time will be made by the Engineering Division of LBG. All changes are to be prepared on standard change order form or work order form properly signed by the Resident Engineer.

(Testimony of W. Lyle Borst.)

"6. All drawings used in the construction of your work shall be properly signed by the Chief Engineer of LBG and the Office of Resident Engineer.

"7. All welders employed on high pressure work are to be approved by Cory-Joslin.

"These instructions are being sent you in order that you may understand whom you should contact for decisions on the work. Mr. Ralph Jung will represent Cory-Joslin on your work. Mr. D. C. Smith will represent the Engineering Division in all matters that concern inspection or engineering decisions to be made. It is to be strictly understood that all authority for changes of construction must be signed by the Office of the Resident Engineer.

"Yours very truly,

"WILLIAM S. LOZIER, INC.,
BRODERICK & GORDON,
"Engineering Division.

"By J. S. HAGAN,
"Chief Engineer."

Now, you received that letter?

A. Yes.

Q. Now, that letter set out the only connection you had with anybody else in regard to this work, outside of Cory-Joslin.

A. It set out the position of the parties.

Q. And everything else not specifically mentioned, you went direct to Joslin with; is that right?

A. Yes.

(Testimony of W. Lyle Borst.)

Q. Can you point out in that letter any authority which they had to change,—to change the responsibility of Mr. Joslin in regard to this suit?

A. No; I don't think that changes the responsibility of Mr. Joslin.

The Court: I think we will recess at this time for fifteen minutes.

March 25th, 1947, 3:00 p.m.

Q. (Mr. Scholz, continuing): Did you request any extension of time due to the shortage of tubes or boilers?

A. We advised the defendant that we would not be able to complete within the time specified.

Q. Did you ever request an extension of time to complete [540] the contract because of the shortages?

A. We outlined a request for additional time on the tenth of November, the day that we were to have normally been completed with the work. We stated that it was not done with any idea of waiving our position in the matter,—that we did not waive any rights we had for additional compensation due to delays.

Q. Did you ever request any additional time other than that which you stated there in which you stated that you did not waive any possible rights you might have had?

A. We advised them of the delay and told them of our situation; yes.

Q. Referring to your Exhibit No. 15, you made formal requisition dated August the 22nd, 1944, to the defendant for new headers, did you not?

(Testimony of W. Lyle Borst.)

Mr. Watts: What is the date of that?

Mr. Scholz: August 22nd, 1944. I think it was plaintiff's Exhibit No. 15.

A. I formally confirmed my requisition in writing to Cory-Joslin.

Q. (Mr. Scholz, continuing): Now, referring to plaintiff's Exhibit No. 46, which is dated March 18th, 1946, and states,—it is addressed to the Power Service Corporation, 711 Wesley Temple Building, Minneapolis, Minnesota: "Final payment on sub-contract F. F. No. 5 to Government contract [541] No. W-461-Eng.-10274, \$1,000.00.

"Payment in full exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision.

"POWER SERVICE CORPORATION,

By P. C. GAFFNEY,

Treasurer."

You accepted that payment, did you not?

A. I did not write that letter.

Q. It is signed by P. C. Gaffney,—

Mr. Watts: We admit that it was accepted and signed by the plaintiff corporation, and that it is binding upon the plaintiff corporation.

The Court: Very well. Now, we can go ahead. They have admitted that it is binding upon the plaintiff corporation.

Q. (Mr. Scholz, continuing): At that time you had filed a claim which was sent to the Chief of Engineers? A. Yes, sir.

Q. That was the claim for \$10,008.32?

(Testimony of W. Lyle Borst.)

A. That is right.

Q. That was the claim which was outstanding?

A. Yes, sir.

Q. And no other claim?

A. There was no other claim. [542]

Q. You accepted this payment in full of all claims, except the claim in that sum; is that correct?

A. The intent was—

Q. (Interposing:) I think you should answer that question, Mr. Borst.

A. Yes; we accepted the check as final payment as coming forward on the basic contract after the modification. However, it was not the intention to waive any claim that we had.

Q. When you accepted that you stated that it was payment in full exclusive of the outstanding claim of the Power Service Corporation which was submitted to the Chief of Engineers, the claim which, as I understand it, was for \$10,008.32, and is the claim which you have referred to?

A. That is the claim which was submitted to the Chief Engineer; yes, sir.

Q. Where does that state there is any other claim? Can you show me where it states any other claim?

A. No; this has reference to the one claim.

Q. You mentioned, Mr. Borst, that you are asking for damages for being there ninety days?

(Testimony of W. Lyle Borst.)

A. For myself.

Q. You are the only one that had authority to sign any change orders on behalf of the Power Service Corporation?

A. Yes; it was established, as I remember it, that I had the power of attorney for that purpose.

Q. You are the only one there that had that power—was anybody else at the site there who had power to obligate the Power Service Corporation on change orders?

A. I think Mr. Nelson executed one in the very last of the job.

Q. I am sorry—I didn't quite understand that?

A. Mr. Nelson executed one.

Q. One of the change orders?

A. A work order, or a change order.

Q. Did he have authority to execute change orders?

A. I don't know whether he had power of attorney, or not.

Q. I am asking, of your own knowledge, you are the only one that had power to obligate the plaintiff on any change orders? Do you know of anybody else who had such authority?

A. Mr. Nelson would be in that position.

Q. He had the power to obligate the plaintiff?

A. He had the same power I did from the company.

Q. Now, what was the last date of the change order?

A. It was—I don't just recall.

(Testimony of W. Lyle Borst.)

Q. The 16th of December, 1944?

A. About that time; yes.

Q. That was the date, Mr. Borst, according to what I have here—the sixteenth of December, 1944, but was issued [544] later than that, wasn't it?

A. Yes.

Q. Who signed that change order for the plaintiff?

A. As I remember it, Mr. Nelson did sign a proposal or change order for a sum of money dealing with the very last piece of work that was brought up as a change.

Q. I cannot seem to find any change order—have you anything to show that Mr. Nelson had authority to obligate the plaintiff in this matter?

A. No; except his regular, normal authority from the company. He signed all checks.

Q. And do you recall the date that you made requisition for tubes?

A. Written requisition?

Q. Yes.

A. I would have to go back to the exhibits.

Q. I think it was on August 22nd. Now, referring to the damages, did you have a large turn-over on that job?

A. Not to any marked degree.

Q. That does not mean anything to me.

A. Well, I would say no.

Q. What percentage did you have of turn-over?

A. I have not made any exact calculation, but

(Testimony of W. Lyle Borst.)

perhaps twenty to thirty per cent of the men were not there all of the time. [545]

Q. That is your turn-over of labor on the whole job? A. Yes.

Q. What was the turn-over in boiler men? You are alleging damages, and you said that when you stopped work you lost laborers. That is why I asked.

A. Well, the same ratio would hold true for all classes of men, mechanics, boilermakers and all.

The Court: What was the general turn-over on other contracts during the war period? Did you have any ratio, or any fixed amount that you figured as turn-over?

A. We had one contract which happened to be on a ship building job, and the rate was higher there. That contract had probably fifty per cent, but they were not getting the kind of money that they could other places, and they would just stay until they got something else.

The Court: What was the figure that was about normal during this period of time?

A. It would be about thirty or forty per cent, in my opinion.

Q. (Mr. Scholz, continuing:) My notes show that the first time that you claim that the defendant had breached his contract was on September 7th, 1945, in a letter which was not addressed to the defendant?

A. That is one of the documents in which we put in that term.[546]

(Testimony of W. Lyle Borst.)

Q. Did you ever claim any breach of contract before September 7th, 1945?

A. In fact, we did. That was our whole thinking. We had not received the tubes in time—

Q. (Interposing:) And you wrote letters that you had not received the tubes and the headers, I know that, but did you make claim to the defendant for damages by reason of breach of contract?

A. We didn't put it in those words. We said—

Q. (Interposing:) Yes, I know the tubes were missing.

A. And we asked for remuneration and damages.

Q. But that was denied? A. Yes.

Mr. Scholz: I believe that is all.

Cross Examination

By Mr. Gibson:

Q. As I understand it, Mr. Borst, when you came down you brought Mr. Nelson with you because he was one of the oldest employees of the corporation? A. Yes, sir.

Q. And during your absence Mr. Nelson would be the next man to succeed you in representing the plaintiff corporation in the supervisory work?

A. He was the superintendent. [547]

Q. He was the next in rank of importance in the staff of men that you had at Sunflower?

A. Yes; he was, in effect, but as far as handling the work was concerned, he was the superintendent.

Q. He was the superintendent, and you actually

(Testimony of W. Lyle Borst.)

were the project manager. Would you say that was correct?

A. I was still acting in my own capacity as Chief Engineer, and doing the best I could to work this through.

Q. So that you came down here when you were notified that you had gotten the bid—that you were successful, and when you came to Sunflower the thought was by you and the officers of the corporation that during your absence from the project Mr. Nelson would take over?

A. During the time I was there he was in actual charge.

Q. And during your absence from Sunflower who would be in charge of this contract on behalf of the Power Service Corporation?

A. Mr. Nelson.

Q. And that was the thought you had at the time you took Mr. Nelson down? A. Yes.

Q. He went down there immediately following the notice that you were the low bidder, when you went down about the eleventh or twelfth, or thirteenth, of July? [548]

A. Yes, sir.

Q. My impression was that you came by automobile, was he with you? A. Yes, sir.

Q. You came down first to bid on this job, and to look it over in compliance with a telephone request. Did you bring Mr. Nelson with you at that time? A. No, sir.

Q. You did come down in reply to a request?

A. Yes.

(Testimony of W. Lyle Borst.)

Q. Two gentlemen came with you, one was Mr. Brockhoff, I believe? A. Yes, sir.

Q. And the other I think you said was Mr. Forkey? A. Yes, sir.

Q. Were these gentlemen engineers?

A. They are registered engineers, graduated and registered in the state of Minnesota.

Q. They were the ones that assisted you in compiling the data from which you finally submitted that bid? A. That is correct.

Q. Now, back at the home office, what does the office force consist of back there? Mr. Fegels is the president, I understand? [549]

A. That is right.

Q. And who is next in command?

A. Mr. Conkey.

Q. And another gentleman, I believe, was Mr. Gaffney? A. He is the treasurer.

Q. Who is the secretary?

A. A. R. Howard.

Q. Is that a lady, or a man?

A. That is a lady.

Q. Does she put in her time at the office?

A. Yes, sir.

Q. At the home office? A. Yes, sir.

Q. And what clerical office force did you have in 1944 in the home office?

A. Well, both Mr. Forkey and Mr. Brockhoff were there.

Q. They were engineers? A. Yes, sir.

Q. Are they full time employees?

(Testimony of W. Lyle Borst.)

A. Yes, sir, of long standing, of some twelve years—ten years at that time, and under them was a regular crew of draftsmen and junior engineers, of which there would have been about three at that time.

Q. Three junior engineers? [550]

A. Engineers and draftsmen.

Q. Did you have clerical help?

A. Yes; we did have a stenographic force.

Q. How many did you have?

A. There were two girls in addition to Miss Howard.

Q. Who took care of the books of the company?

A. Mr. Gaffney.

Q. Is it Miss, or Mrs. Howard?

A. Miss Howard.

Q. Was she the girl in charge of the office, and over these other two young girls?

A. That is right.

Q. Chief clerk in the office?

A. Secretary of the company — she had been there for some years.

Q. Now, the people that you have mentioned, plus the junior engineers, are they full time employees, and were they in 1944? A. Yes, sir.

Q. And the two girls? A. Yes, sir.

Q. Does that compose the entire office force?

A. As of that time, as nearly as I can remember.

Q. Does Mr. Fegels put in any amount of his time in working [551] on these problems that you solicit and put through?

(Testimony of W. Lyle Borst.)

A. No; he is retired. His residence is in the state of Texas.

Q. He put in a little time in the office—I think you mentioned that he came to the plant?

A. Yes; he did come to the plant.

Q. Now, Mr. Conkey, does he put his time in at the office or the plant? A. Yes, sir.

Q. Is his time taken up with the power Service Corporation, or the Fegels Construction company work? A. With both.

Q. Mr. Gaffney—how is his time devoted?

A. About fifty-fifty.

Q. Would the — with the Fegels Construction Company and the Power Service Corporation?

A. Yes.

Q. Is the Fegels Construction Company, as to a point of size and the work they do—how does their work compare with that of the Power Service Corporation?

A. They are considerably larger.

Q. Both the Power Service Corporation and the Fegels Construction Company, do they occupy the same office, or the same quarters? [552]

A. With the exception of the drafting room. It is entirely removed.

Q. There was just not room enough in the building, is that the case? A. That is right.

Q. And you had to move to some other building?

A. Yes, sir.

Q. Do you know the salary paid to Mr. Fegels for his service to the Power Service Corporation in 1944?

(Testimony of W. Lyle Borst.)

A. I don't know whether the statement shows that definitely.

Q. No; the statement you submitted does not, but I thought that you would know what his salary was in the Power Service Corporation.

A. I think that I do know, but I would not be able to make a sworn statement as to that fact.

Q. What is your best judgment? What is the best statement that you could make?

A. I would say twenty thousand a year.

Q. And how about Mr. Conkey—I am talking now about the salaries in the Power Service Corporation.

A. Yes.

Q. He also gets a salary from the Fegels Construction Company, does he?

A. Yes. [553]

Q. Now, how about Mr. Conkey?

A. Well, with the same background to my answer, it would be about ten thousand a year.

Q. He puts in most of his time in the Power Service Corporation?

A. No; with the Fegels Construction Company.

Q. Most of his time is put in with the Fegels Construction Company?

A. Well, that is probably not an absolutely a fair statement.

Q. Well, his activities are divided between the two companies?

A. Yes; that is right.

Q. And the bigger volume of business is with the Fegels Construction?

A. Yes, sir.

Q. How about Mr. Gaffney, do you know what his salary is?

A. I think four thousand.

(Testimony of W. Lyle Borst.)

Q. From the Power Service Corporation?

A. Yes; I think four thousand a year.

Q. You don't know what he gets from the Construction Company?

A. I may be in error in that, but I would say that it would be about six thousand. His entire salary, I would say. I may be in error with respect to this salary, however. [554]

Q. And in addition to this, you have a retirement program in the office, and there is some seven thousand dollars set aside by the corporation. Is that in payment of some sort of blanket insurance for everybody in the office, and is it paid into an insurance fund that gives you a sum of money after a period of years?

A. I think it is the John Hancock Company that has the insurance—anyway, I think this is paid to the beneficiary on the death of the employee, as well as certain sums of money.

Q. Do you, as well as other employees, share in that? A. Yes, I participate in it.

Q. The seven thousand dollars, or whatever the figure is, is paid by the corporation?

A. Yes, sir.

Q. And then you pay in certain sums of money?

A. No, sir; that is all by the corporation.

Q. That is all by the corporation? A. Yes.

Q. Under this authorization—strike that, please. Under this contract the Government wanted someone to be at the site to sign change orders, work orders and to act on behalf of the Power Service Corporation at all times? [555]

(Testimony of W. Lyle Borst.)

A. That is correct.

Q. In connection with that, immediately upon your having been selected as the lucky company for this contract, you were given—by that, I mean your corporation, your corporation was required to supply the name of someone and they designated you for that position? A. Yes, sir.

Q. I call your attention to the power of attorney which you mentioned, which is dated July 11th, 1944, do you recognize that? A. Yes, I do.

Mr. Gibson: I offer it in evidence as Defendant's Exhibit "A".

Mr. Watts: I have no objection.

The Court: It may be admitted.

(Whereupon document referred to was marked Defendant's Exhibit "A" for identification and admitted in evidence.)

Mr. Gibson: I will read it.

"July 11th, 1944.

"POWER OF ATTORNEY

"I, D. B. Fegles, President of the Power Service Corporation do hereby certify that the following is a true and exact copy of excerpts from the minutes of [556] a special meeting of the directors of Power Service Corporation, held at 711 Wesley Temple Building, Minneapolis, Minnesota, at ten o'clock in the morning of July 11th, 1944.

"It was stated by Mr. Fegles that the purpose of the meeting was to authorize a representative of the company to act for the company at the site

(Testimony of W. Lyle Borst.)

in the acceptance of, or signing of, change orders, and payment estimates, and negotiate price changes, in connection with the prosecution of Subcontract No. 5 to F.F. Construction Subcontract No. 5, principal contract No. W-461-Eng-10274, Power House No. 1 at Sunflower Ordnance Works, Kansas City, Missouri.

"After discussion it was moved, seconded, and carried that W. Lyle Borst, Chief Engineer, be so authorized and that his signature on such above listed documents be binding upon the corporation.

"Carried."

This is signed "D. B. Fegles, President, and is subscribed and sworn to before a Notary Public. This is his signature is it, Mr. Borst?

A. Yes.

Q. You know that you have to have a similar document so [557] there will be someone in the project to represent any subcontractor?

A. Yes, sir.

Q. And you contemplate that Mr. Nelson, during your absence, would fill in that position and be authorized by the company?

A. Yes, sir.

Q. Why wasn't he authorized at that time, if you contemplated spending only a little time on the job, or wasn't it a fact that you intended to put in your whole time on the job?

A. Well, the paper was made out to me since I was going down there without any definite understanding that I would be there continuously.

Q. But you made the statement asking for nine-

(Testimony of W. Lyle Borst.)

ty days for yourself based on the fact that the contemplation was to put in a very little time there?

A. If we had been able to do it, we would have followed through with a similar document with Mr. Nelson.

Q. Then you did plan on staying all of the time, and then you would get another document—it wasn't your contemplation that you would spend only a part of the time there when your power of attorney was executed on July 11th?

A. That was done just for immediate satisfaction that [558] I was there in that capacity at that time.

Q. Was there ever an authorization similar to that sent to the defendant under your contract to have someone else represent your company?

A. We didn't follow through, in view of my staying on.

Q. At the beginning of your time there at Sunflower, about the first thing you did was to start working on the preparation of the inventory?

A. Yes, sir.

Q. And you discovered immediately the absence of these tubes?

A. As a result of the advice from Major Matthews.

Q. It wasn't until August 22nd that you filed a specific request with the defendant designating by name and describing the items of tubes that you needed and had ascertained were short?

A. That was a confirmation of the fact that we

(Testimony of W. Lyle Borst.)

found them short, and we wanted to be on record to the effect that they were short.

Q. When did you put in the requisition?

A. The requisition was made for these immediately upon the matter becoming common knowledge. I determined the material was on order, and for the moment it seemed to me that that would suffice, and I left it stand at that. [559]

Q. Under the terms of the contract were you not required to immediately make a list and requisition from the defendant who, under his contract, and under the orders of the A-E-M was to supply the material himself, or through others, that is, the materials which you needed?

A. That is true.

Q. In compliance with that, when did you give him the first requisition for boiler tubes?

A. The first requisition, in effect, was put out immediately after the fourteenth, because that is when this whole thing became known, and the request was therefore made in effect.

Q. When you say "in effect" you mean that you notified them that there was some tubes short? You didn't notify them whether there were tubes that were three feet long, twenty-five feet, or forty feet long, missing, whether they had fins on—now, Mr. Borst, don't they each have a number to identify them?

A. That is right.

Q. Did you make such a request on the 14th of July when you found there were tubes missing?

A. No; I found out that the material was short,

(Testimony of W. Lyle Borst.)

and the fact was known to all of the agents, that it was short, and therefore it seemed to me that the situation was well known at the moment, and it seemed the natural thing that it would be coming forward as a result of the orders which were on file [560] for the material.

Q. Did you ascertain with reference to that that the tubes that you were talking about were all of the tubes that you needed for the job?

A. We ascertained that these tubes were the tubes that were missing at that time.

Q. From whom did you ascertain that information?

A. From the Combustion Engineering Company's representative, Mr. Bennett.

Q. Did you see the list of the tubes that they were trying to procure?

A. I saw the list that he had in his files, that he brought on the job, and I discussed it, and I made certain about it, and said that these were the tubes that we were needing, and I saw that they were forthcoming, or was so advised.

Q. How did you know that these were the tubes that you needed when you had not completed your inventory, which would give you the tubes on hand—as a matter of fact, you knew only that some tubes were ordered, and you assumed that those were the tubes that you needed; isn't that the situation?

A. Prior to the time that we wrote the letter putting it down, or listing it, or a confirmation

(Testimony of W. Lyle Borst.)

of the requisition, we had gone through the process of handling the tubes, and doing [561] some cleaning and sorting them out, to the point that I made a definite determination of our requirements.

Q. You remember the testimony read into the record by Mr. Watts from the deposition of D. C. Smith in which he said the tubes were put in stand-by condition, and that they were put in condition for ready assembling; was that his testimony, Mr. Borst?

A. In general, it was. I think that was true, generally. I don't recall the exact wording.

Q. And why did it take you from the 14th of July until the 22nd of August before you could get a list of the tubes you needed? You were able to go and get them from the engineer's office, or elsewhere, and why did you take that length of time?

A. This operation was so effectively covered by the diligence, care and exactness of the Combustion and the Hercules people that it didn't seem necessary.

Q. But to follow the terms of your contract it was?

A. That is right, but it didn't until I finally got the information from Mr. Hagan that perhaps it would be necessary form of record to have on file.

Q. You failed to get the requisition for the tubes in until Mr. Hagan wrote you three or four

(Testimony of W. Lyle Borst.)

times and insisted that you bring this up to date? Your last tubes were not ordered until the ninth of September? [562]

A. The requisition to complete the record as a result of Mr. Hagan asking us.

Q. Don't you know that the defendant Joslin could not take any action to expedite any material unless it was designated or described?

A. I was certainly satisfied that the material was forthcoming, and that he, in turn, through the Hercules people was making an effort to get them.

Q. But by your failure to follow your contract it made it impossible for Mr. Joslin to know what to ask for—because of your failure to have a specific list of the specific items, it was impossible for him to know just what to ask for in order to put the pressure of urgency, or to get the proper officer to act, because you didn't get your list prepared?

A. There was a list established by the Hercules people at the outset.

Q. When did you find out about that list?

A. Within a day or two after my conference with Major Matthews.

Q. Did you get a copy of that list?

A. No, sir.

Q. Did you compare it with your inventory so that you could follow up with a requisition to Mr. Joslin under your contract? [563]

A. No, sir.

Q. Have you the requisition covering all of these materials?

(Testimony of W. Lyle Borst.)

A. Exhibit 20, or 19—I think 20.

Q. As I understood from your testimony previously—I am now holding Exhibit 20—from the testimony you gave at the time this exhibit was offered in evidence I understand, Mr. Borst, that this is a file of your carbon copies of the requisitions for missing material that you made to Cory-Joslin under the terms of your contract?

A. Yes, sir.

Q. It starts out on July 25th, 1944, Material Requisition No. 1, in which you made up a list of some items?

A. That is right.

Q. And on August 19th you finally got to requisition No. 26, and it says, "As a matter of record, we wish to confirm our verbal advice on the shortage of water-wall tubes for boilers No. 1, No. 2 and No. 3. The tubes were found to be short on July 14th, 1944, and the matter discussed with Major Matthews, Captain Overesch, Mr. D. C. Smith of Lozier, Broderick & Gordon, and Mr. Ralph J. Jung of Cory-Joslin & Macnson.

"These tubes to be furnished by Combustion Engineering Company are as follows: Three each F-4R-L 3 inch by two hundred inch furnace tubes," and then there follows a long list of the same things. These were furnace tubes. Later on were there [564] some boiler tubes, the boiler tubes you are complaining of?

A. Water-wall tubes are furnace tubes.

Q. That was the first day you gave your list?

A. That is the formal requisition confirming it.

(Testimony of W. Lyle Borst.)

Q. On September 5th you made a supplemental list?

A. That was for materials found defective.

Q. And that was for water-wall or boiler tubes?

A. I think you are right.

Q. You say that you required some thirty-seven tubes, those were required—this is dated, Mr. Borst, September 1st, 1944, and covers about thirty-four tubes, as I add them up?

A. Those are boiler tubes proper.

Q. Those were replaced, defective tubes?

A. Yes, sir.

Q. You completed the inventory about what date?

A. The major portion of the work was done about September 9th. There were some, however—several additional ones outside of those.

Q. Of the total amount of tubes that were short—there were some seven hundred odd tubes required for the three boilers? A. Yes, sir.

Q. And possibly about one third of them short? That is about 220 or 216? [565]

A. Yes, sir; I think that is right.

Q. If I understand you correctly, those were some of the most important items that you needed first in the construction of this job?

A. They were vital, along about the third step of the work.

Q. Knowing that you could not proceed further you waited from the 14th of June about seven weeks before you made a requisition?

(Testimony of W. Lyle Borst.)

A. Well, my asking for the tubes had been done, and this was a confirmation of the situation, and that part would be only a formal record that the tubes were coming forward.

The Court: You experienced no delay until that time?

A. Yes, I had been delayed in August, but I had gotten some tubes that I had requisitioned by that time.

The Court: I thought your testimony was that August 29th was the first time that you experienced any delay? A. I think August 17th.

The Court: We will adjourn at this time until ten o'clock tomorrow morning.

March 26th, 1947, 10:00 a.m.

Q. (Mr. Gibson, continuing:) Mr. Borst, I am calling your attention now to Exhibit which has been marked 12-A, and I presume it is admitted it is a letter written August 15th, 1944, and signed by Mr. Hagan, on behalf of the A.E.M., and it is directed to you. The subject is "Material shortages."

"Attention: Mr. Borst:

"Subject: Material shortages.

"Gentlemen:

"Receipt is acknowledged of your requisitions numbered one to thirteen, the latter being dated August 11th, 1944. We assume that the above requisitions represent all of the shortages of materials required for completion of your contract on Power

(Testimony of W. Lyle Borst.)

House No. 1, and that the same are the result of a complete inventory made by you in accordance with paragraph 5-04 (b) of your contract.

“If the above requisitions do not cover all of the shortages we should be advised at once of any further material requirements so that the progress of the work will not be delayed. In accordance with the above mentioned paragraph of your contract, a complete inventory was to have been prepared immediately upon starting your work so that shortages could be determined. [567]

Yours very truly,

WILLIAM S. LOZIER, INC.,
BRODERICK & GORDON,
J. S. HAGAN.”

You remember receiving that letter?

A. Yes, sir.

Q. I call your attention to a letter from you to the A.-E.-M., attention; Mr. Hagan, and that is dated August 16th, 1944, in which reference is made to the letter which I just read, which was dated August 15th; is that correct? A. Yes, sir.

Mr. Gibson: At this time I offer this letter in evidence as Defendant's Exhibit, which is next in order. I imagine it is Exhibit “B”.

(Whereupon document referred to was marked Defendant's Exhibit “B” for purposes of identification.

Mr. Watts: We have no objection.

The Court: It may be admitted.

(Testimony of W. Lyle Borst.)

(Whereupon Defendant's Exhibit "B", for identification, was admitted in evidence.)

Mr. Gibson: It is as follows:

"Sunflower Ordnance Works,
August 16th, 1944.

"William S. Lozier, Broderick & Gordon,
Sunflower Ordnance Works, [568]
Box No. 36,
Kansas City, Missouri,

"Attention: Mr. J. S. Hagan, Chief Engineer.

"Gentlemen:

"Reference to your letter of August 15th relative to requisitions for material. We find upon coming on this work that there are no complete lists of materials, bills of materials, or shipping lists available from which to work in preparing our requisitions. These bills of materials would normally have been available. In view of this we find it necessary to make up an entire new list of materials. Preparing this form from the drawings and field observations. This is a major piece of work and is being carried on at this time, and our inventory is checked against this bill of materials. We are endeavoring to complete this requisition as rapidly as possible.

"Yours very truly,

POWER SERVICE CORPORATION,
W. Lyle Borst."

(Testimony of W. Lyle Borst.)

The letter of August 15th which is mentioned is the one that I read previously? A. Yes.

Q. Now that letter, Exhibit B which I just completed reading you sent in reply to the letter of August 15th? A. Yes, sir. [569]

Q. Your contract required that you make an inventory with reference to furnishing material lists, or purchase orders?

A. There was no specific mention of it.

Q. Now then, Mr. Borst, this letter I show you, ---I asked you to produce the letter, that is the original letter, and you stated that you didn't have it, but had no objection to this copy?

Mr. Watts: That is right, Mr. Gibson.

Q. (Mr. Gibson, continuing:) I call your attention to a letter of August 19th and ask you if you received the original of that letter?

A. That is right.

Mr. Gibson: I offer this as Defendant's Exhibit, the next number in order.

(Whereupon document referred to was marked Defendant's Exhibit "C" for purposes of identification.)

Mr. Watts: We have no objection.

The Court: It may be admitted, and that is Exhibit "C".

The Clerk: That is right, your Honor.

(Whereupon Defendant's Exhibit "C" for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) This letter is dated August [570] 19th, 1944, and is addressed to the Power Service Corporation, Sunflower Ord-

(Testimony of W. Lyle Borst.)

nance Works, DeSoto, Kansas, Attention, W. Lyle Borst, Chief Engineer. The subject is "Material and Equipment Inventory, Power House No. 1, Building 154-1," and is as follows:

"Gentlemen:

"In your letter of August 16th, 1944, you state that there were no complete lists of materials, bills of materials, or shipping lists available from which to work in preparing your requisitions.

"You were given a list of materials and equipment together with their respective list numbers and purchase order numbers, which had been furnished and delivered on the plant site by the Hercules Powder Company. This list was complete according to the Hercules Powder Company's records. However, it was known that some materials had been borrowed from Power House No. 1 inventory by the Hercules maintenance and operating departments, and others, that there was no definite record of just what materials had been taken. That was one reason for requiring a complete field check of the materials and equipment inventory by the subcontractor.

"There was no detail list available for the Combustion Engineering Company equipment nor for the W. K. Mitchell [571] Company piping.

"Very Truly Yours,

WILLIAM S. LOZIER, INC.,
BRODERICK & GORDON."

signed by "J. S. Hagan." Do you remember receiving that letter in connection with this matter?

(Testimony of W. Lyle Borst.)

A. Yes, sir.

The Court: What date is that letter?

Mr. Gibson: August 19th, following the letter written by Borst of August 16th.

Q. (Mr. Gibson, continuing:) In other words, Mr. Hagan called attention to the reason for making the list? A. Yes; that is right.

Mr. Gibson: I am now reading from Exhibit 14-A, which is a letter from the A.-E.-M., signed by Mr. Hagan, Chief Engineer:

“August 22nd, 1944,

“Power Service Corporation,
Sunflower Ordnance Works,
DeSoto, Kansas.

“Attention: W. Lyle Borst, Chief Engineer.

“Subject: Defective boiler tubes.

“Gentlemen:

“We have been advised that in the process of [572] cleaning up boiler tubes for Power House No. 1,—”

Q. (Mr. Gibson, continuing:) Building No. 1, that was the number that was allocated to the power house that is in question here?

A. Yes, sir; that is right.

Q. All the buildings had a number?

A. Yes, sir.

Q. And this building was identified by this “No. 1”, that is Power House No. 1, and building No. 154-1? A. I presume that is true.

Mr. Gibson: I will continue with the letter: “Building No. 154-1, some defective tubes have

(Testimony of W. Lyle Borst.)

been encountered. It is our understanding that the Hercules Powder Company has placed an order for the number of tubes that have been found defective to date, which would cover your present requirements.

“In order that the number of defective tubes that will be required to be replaced in all three boilers can be determined, the remaining tubes that have not been examined at this time should be cleaned up at once so no delay will ensue. Any delay caused by the number of defective tubes not being determined must be absorbed by the Power Service Corporation.

Very truly yours. [573]

WILLIAM S. LOZIER, INC.,
BRODERICK & GORDON.”

This indicates a number of copies of this letter sent to the Resident Engineer, R. N. Wheelock, F. V. Wedlick, L. J. Neubauer, Power Service Corporation.

Q. Do you remember receiving that letter?

A. Yes, sir.

Q. Does that not create a little difference in the handling of tubes found short on the inventory as compared with defective material which required replacement, so far as the contractor was concerned?

A. There were tubes determined as being mis-used, or mis-handled upon taking off this grease.

Q. The contract provides that defective material is to be replaced by the contractor?

(Testimony of W. Lyle Borst.)

A. That is right.

Q. Now, with reference to the material that was absent from the plaintiff's inventory, that was to show that which was absent so that a requisition could be put in on it to give Mr. Joslin, or others, an opportunity to procure those items; isn't that right? A. Yes, sir; I think that is right.

Q. I am now referring to the provisions of clause 5-04 (b) of the contract, which clause provides for an inventory [574] of materials to show the shortage, a list of all of the materials, and provides that this shall be complete. Now then, the contract provides that if through carelessness of yours you break any of the materials that you had to replace this at your own expense; is that right? A. Yes, sir.

Q. That point was not raised?

A. No, sir; I think not.

Q. Now, I call your attention to a letter which is dated August 26th, addressed to the Power Service Corporation for the attention of Mr. W. Lyle Borst. The subject is "Inventory," and it is signed by Mr. Hagan for the A.-E.-M.

Mr. Gibson: I offer it as Defendant's Exhibit "D".

(Whereupon document referred to was marked Defendant's Exhibit "D" for identification.)

Mr. Watts: No objection.

The Court: It may be admitted.

(Testimony of W. Lyle Borst.)

(Whereupon Defendant's Exhibit "D" so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) Do you remember receiving the original of this letter, Mr. Borst?

A. Yes, sir.

Mr. Gibson: The letter is as follows:

"Gentlemen:

"To date we have thirty-three of your requisitions [575] listing shortages of material that is to be furnished you under your contract. The last requisition is dated August 23rd.

"In order that all shortages may be determined in sufficient time that the required materials may be placed at your disposal it is imperative that your inventory be completed at the earliest possible date as required by paragraph 5-04 (b) of your contract.

"If this inventory has not been completed to date, we request that the same be completed at once and a list of all material shortages be in our hands on or before September 9th, 1944.

Very truly yours,

WM. S. LOZIER, INC., BRODERICK
& GORDON."

That is signed by Mr. Hagan.

Q. Do you remember receiving that letter?

A. Yes, sir.

Q. After you were on this job for a while, Mr. Borst, did you receive a letter in which you were

(Testimony of W. Lyle Borst.)

instructed,—Strike that, please, Mr. Reporter. Did you get the inventory completed by September 9th, 1944?

A. All the basic material was established by that date; yes, sir. [576]

Q. When you say “basic material,” you mean material necessary to complete that part of the contract?

A. Well, there was this fact, that in the final windup we found some items in the nature of certain appurtenances and a certain piece of machinery,—for example, we will take the soot blower, which was a particular device in this job, and in going over the material on the floor there we would count all of the elements and parts required actually going into this device, but when it came to actually putting it up we would find possibly some little casting was missing, and, as I say, in winding up these jobs, that would be the result,—some little casting would be missing which did not show up before, or which we thought were there in sufficient quantities, and in cases of this kind it would be determined that there was a shortage. Now, that was the type of equipment that might show up after that time.

Q. I have a letter here, Mr. Borst, which has been marked as Defendant’s Exhibit “E” for identification. It is dated August 31st, 1944, and is from the Power Service Corporation, signed by W. Lyle Borst, addressed to Lozier, Broderick & Gordon, Sunflower Ordnance Plant, Kansas City,

(Testimony of W. Lyle Borst.)

Missouri, for the attention of Mr. Hagan. The subject is "Defective Boiler Tubes." Is that your signature on that letter? A. Yes. [577]

(Whereupon document referred to was marked Defendant's Exhibit "E", for purposes of identification.)

Mr. Gibson: We offer it in evidence as Defendant's Exhibit "E".

Mr. Watts: No objection.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit "E" so marked for identification, was admitted in evidence.)

Mr. Gibson: This letter is as follows:

"Gentlemen:

"Reference to your letter of August 22nd regarding the checking of boiler tubes, we wish to advise that these tubes have now been checked, and a requisition issued for the deficiency. This operation required considerable more work in the way of cleaning the tubes in order to properly inspect them than would have been necessary from the standpoint of erection only.

Very truly yours,

POWER SERVICE CORPORATION."

Q. Based upon that letter dated August 31st stating that you had requisitioned the material, or the tubes, you mean by that that they were going

(Testimony of W. Lyle Borst.)

on the way. Now, on September 1st certain material was requisitioned, and that was on requisition No. 43, which was dated September 1st. Is that the same,— [578] or are those the same tubes that you refer to in the letter of August 31st?

A. I think that is the exhibit.

Q. Are you sure of that, Mr. Borst?

A. Yes; I am. I might have dictated them one day apart.

Q. In response to a letter from the Chief Engineer, Mr. Hagan, did you ever write a letter stating that you had completed your inventory in response to the directive to get the inventory in by September 9th?

A. I don't remember whether I wrote a letter exactly of that wording, or not.

Q. You continued to send in requisitions clear on up, and possibly beyond, the ninth of September, did you not?

A. Yes; there were some requisitions following that.

Q. As a matter of fact, you sent requisitions,— I think it is Exhibit No. 20,—I think that is the requisition for material,—there is one dated as late as October 12th, which is more than a month after the date given you by the A.-E.-M. That is requisition No. 85?

A. Yes, sir.

Q. So that between the requisition which I read which was dated September 1st, and was requisition No. 43, and between the letter of August 31st and October 12th, you sent in 40 or more requisitions?

(Testimony of W. Lyle Borst.)

tions, almost as many as you had sent in before that time? [579]

A. Yes, sir, and I think those dates are correct as you have stated.

Q. These were for minor items, the requisitions that were sent in between August and October 12th. They were all similar requisitions, that is, for similar materials, except those couple in there for tubes and headers. They covered the type of material as you were ordering in the nature bolts, nuts, gaskets and stuff like that?

A. Yes, sir; similar to that.

Q. Now, in order to clear up a possible doubt, I am calling your attention to a letter of August 17th, 1944. The subject is "Requisitions," and the letter is signed by Mr. Hagan. I will ask you to read it, Mr. Borst, rather than to clutter up the record with it.

A. Yes, sir.

Mr. Gibson: I ask that the Clerk give me a designation on this as Defendant's Exhibit "F".

(Whereupon document referred to was marked Defendant's Exhibit "F" for purposes of identification.)

Mr. Gibson: And I now offer it in evidence.

Mr. Watts: No objection.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit "F" so marked for identification, was admitted in evidence.) [580]

Mr. Watts: I have no objection, Mr. Gibson, to

(Testimony of W. Lyle Borst.)

any letter going in the record that was sent between the plaintiff and the A.-E.-M., or between the plaintiff and the contractor, or between the plaintiff and the Government.

Mr. Gibson: I think, perhaps, I should read this letter into the record. It is as follows:

“Gentlemen:

“In the future when you issue a requisition to Cory, Joslin & Maensons covering any material shortages that may exist, we wish you would send one copy to the office of the Resident Engineer, marked for the attention of R. H. Downing.

“The copy addressed to Lozier, Inc., Broderick & Gordon should be marked for the attention of J. S. Hagan, Chief Engineer.

“It has been requested by the Office of the Resident Engineer that copies of letters concerning matters of a controversial nature be sent to that office marked for the attention of R. H. Downing.

Very truly yours,

WILLIAM S. LOZIER, INC.,
BRODERICK & GORDON.”

That is signed by Mr. Hagan.

Q. (Mr. Gibson, continuing:) Was not the purpose of that [581] to aid in bringing to the attention of the A.-E.-M., which was Mr. Hagan, any shortage so that all speed possible could be exercised in getting those things because this matter had been dragging there at the plant until August 17th? Was not that the purpose?

(Testimony of W. Lyle Borst.)

Mr. Watts: Objected to as being argumentative. I think the Court can determine these questions.

The Court: He may answer.

A. I don't know exactly the purpose, or the objective of the letter, but it was true that the Engineer's Office wished to be kept acquainted with the progress of the work at all times.

Q. Your first requisition was to the defendant, Cory-Joslin, is that not true, Mr. Borst?

A. Yes, sir.

Q. And then Cory-Joslin in turn were supposed to send them to the proper source for procurement, unless they procured the materials themselves?

A. That is right.

Q. And in order to save time in getting to Cory-Joslin, or from Cory-Joslin to the A.-E.-M., and then to some procuring agency involved where the items would be procured at a place perhaps Mr. Joslin didn't know where they were, was it not the purpose of this letter to have the information in the [582] office of the A.-E.-M., to save delay in getting it to the proper department?

A. I am not certain of the purpose of that letter.

Q. Was it explained to you that it was to speed up the production? A. No; it was not.

Q. What was your interpretation of it?

A. Well, I just thought it was a formal record for the A.E.M., and the Government.

Mr. Gibson: I am offering now in the record Defendant's Exhibit "G". It is dated August 19th, 1944.

(Testimony of W. Lyle Borst.)

Q. (Mr. Gibson, continuing:) Did you receive a copy of that letter,—I believe it was read as a part of the deposition by Mr. Watts?

A. Yes; we received it.

Q. You did receive it? A. Yes, sir.

(Whereupon document referred to was marked Defendant's Exhibit "G" for purposes of identification.)

Mr. Gibson: This letter was read yesterday, I believe. It is marked as Exhibit "G" now. It is addressed to the Power Service Corporation for the attention of W. Lyle Borst, and is signed by Mr. Hagan. The subject is the contract that we have been discussing here for these several days. [583] It says:

"Gentlemen:

"This is to advise that the following procedure will be set up to handle your Lump Sum Contract No. 5 under Corey, Joslin & Macnsons," and then subparagraph No. 2 reads:

"Cory-Joslin will have charge of the coordination of your work with other crafts."

And then it goes on,—I think it might be of value in clearing up some of the matters later.

Q. (Mr. Gibson, continuing:) Mr. Borst, a part of your work under contract you asked for permission to sub-let that work to some other concern, did you? A. Yes, sir.

Q. And one of the concerns was A. H. Bennett Company? A. That is correct.

(Testimony of W. Lyle Borst.)

Q. What part of the work did you subcontract to them?

A. The work of installing pipe covering and insulation.

Q. Will you explain that more fully?

A. Of all of this piping, or we will say piping which was carrying steam or water, which carried a temperature above room temperature,—anything over one hundred degrees, there was a coating of material applied,—heat resisting material,—magnesia or rock wool, or something of that nature. [584]

Q. And they did the installing of the pipe covering and the insulation? A. Yes, sir.

Q. They had nothing to do with the brick work?

A. There may have been some phases of the work done by other contractors,—the brick work had nothing to do with the insulation.

Q. That was a separate contractor that did that phase of the work; even though it was a part of this original contract you decided it was better for someone else to do that work?

A. That is common practice to have the work subbed.

Q. How much did you pay them to do that work?

A. I don't remember the exact figure, but I think in the neighborhood of \$30,000.

Q. Can you determine the exact figure on that?

A. I don't think I have the subcontract records here with me.

Q. And your best figure on that now is thirty thousand dollars? A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. You had another subcontractor, I believe,—what was that?

A. That was the Northwest Fire Brick Service Company.

Q. What did they do? [585]

A. They installed the brick work in connection with the boiler proper. The brick work being a part of the job that has to do with the housing of the furnace, and the boiler, and the fire inside of the boiler.

Q. What was the amount of that, if you know?

A. I think that was about \$18,000.00.

Q. Do you have a record of that here?

A. No, sir.

Q. Now, as to the work under your contract, you were responsible for the requisitioning of material, any material to complete the work of either the subcontractor Bennett or the Northwestern Fire Brick Service Company? That was the same as your own work? You were responsible for requisitions for that work? A. Yes, sir.

Q. That was a part of your contract?

A. Yes, sir.

Q. Did these subcontractors operate simultaneously with you? A. Yes, sir.

Q. You know that they were still sending in requisitions from the Bennett Company for miscellaneous items,—calling your attention, Mr. Borst, to a letter of November 27th, which was after the date set for your completion of this job, they sent in for material on November 25th; November 22nd,

(Testimony of W. Lyle Borst.)

November [586] 22nd, and November 18th; also on November 9th?

A. I would say, Mr. Gibson, in respect to that, that a good deal of that material resulted in the inspections, or resulted from the procedure for the reason that the exact method of application, the exact thickness, and the exact number of layers were established as the work progressed, and by reason of the inspection of Mr. Neubauer.

Q. Mr. Neubauer occupied,—

A. (Interposing:) I was not quite through with my answer.

Q. I beg your pardon.

A. They were presumed to be on the proper approach to this thing, but then it would be decided during the progress of the work to use more cover, possibly another layer or so.

Q. Mr. Neubauer occupied the position formerly held by D. C. Smith? A. Yes, sir.

Q. And both were employees of the A.-E.-M., and Lozier, Broderick & Gordon, but not of the defendant? A. That is right.

The Court: Is this last work that has been referred to here, work of the subcontractors, is that tied in with the operation of the work which required the water-wall tubes that are under discussion in this suit? [587]

A. It ties in, in this respect, your Honor: The water-wall tubes and the installing of them, and the hydrostatic tests and the putting in of the brick work, which was by the Northwestern Fire Brick

(Testimony of W. Lyle Borst.)

Service Company, and some of the installation done by the Bennett Company, was applied to the exterior of the water-wall and to the boiler proper, so it was done after we got the water-wall up.

Q. (Mr. Gibson, continuing:) I ask you, Mr. Borst, if you received a copy of the letter which informs that as of August 21st, L. J. Neubauer replaces D. C. Smith as engineer?

A. That is right.

Q. Was that about the date he succeeded Mr. Smith?

A. Yes. He had been there at Hercules prior to that time.

Q. Under the contract there was a small amount of material that the contract indicates that you were to pay for?

A. Yes, sir.

Q. I think some cutting oil and welding bars. Have you any record of the total amount of that cost?

A. I don't have it here; no.

Q. What is your best estimate as to what you had to expend in material on this whole contract?

A. I don't have it in my mind at this time, but in thinking back, I would say four thousand to five thousand dollars,—it [588] might have been as much as ten thousand, but for the sake of a figure at the moment, I would lean on the former.

Q. That is under that part of the contract where it says,—clause 5-04, where it says, "Material and supplies incidental to the permanent construction, including but not limited to, cutting oil, wire, fuel for construction equipment, welding bars, and so

(Testimony of W. Lyle Borst.)

on," that is the clause under which you stated that it was between four and five thousand dollars?

A. Just,—that is just a general estimate. I would not be positive as to the amount.

Q. Do you have your labor payrolls here?

A. Yes, sir.

Q. Are you familiar with the payroll situation there, particularly with reference to the boiler-makers?

A. In general; yes.

Q. See if you can answer this from memory, Mr. Borst: This first payroll, after you got under way, you started I believe before the 18th of July, or about that time, and the first payroll was July 23rd,—I think from the 16th of July to the 23rd of July?

A. I think that is correct. It would take a little time to get it exactly, but I can do it if it is necessary. However, I will accept that date.

Q. Then the next payroll was July 30th. You were in [589] the process of building up a crew, including boilermakers, at that time?

A. Yes, sir.

Q. Now, the first tubes that you started to work on, and were delayed on, were some time in August, I believe. You were leading up to the point when you would have a crew available when the furnace tubes would be installed,—or did you start on them?

A. We started on the boiler tubes, and whatever furnace tubes we had there. We did what we could without all of them on the job.

Q. There were approximately four thousand

(Testimony of W. Lyle Borst.)

boiler tubes in connection with that. Does your recollection check with that, that there were four thousand boiler tubes and seven hundred furnace tubes?

A. Furnace tubes are similar to the boiler tubes.

Q. I should say four thousand furnace tubes, and seven hundred water-wall tubes; is that right?

A. Yes.

Q. The construction is different. You can tell them as soon as you see them,—is there any difficulty in saying which is which, Mr. Borst?

A. Well, there is an intermingling of them so that the description would be hard to determine without an exact and careful check. [590]

Q. Water-wall tubes have different purposes. Now, with reference to the furnace tubes, are they not more or less uniform so that one could tell which it was?

A. Yes; each time you set a row they are designated especially.

Q. Instead of delaying you went ahead and worked on as many as you could with the crew that you had?

A. Yes, sir.

Q. Now, calling your attention to August 13th, that was one month after you had signed Notice to Proceed with the work. Do you have any recollection as to how many boiler men you had on the job at that time?

A. That would be on the payroll of August 13th, did you say?

Q. The payroll of August 13th.

(Testimony of W. Lyle Borst.)

A. Forty-eight boilermakers, if that is the date.

Q. Yes; as of that date. Now, that included the boiler superintendent?

A. Yes, sir; but on further analysis we had other operators there, such as the air compressor operator, and hoist operator, a carpenter foreman for the scaffolding, and also men to do the oiling, doing work in connection with the boilers.

Q. I am asking now, Mr. Borst, about the craft designated by the Union as "boilermakers," and "helpers,"—boilermakers and boilermaker helpers?

A. They are the ones I gave the figure of "forty-eight."

Q. Now, do you have a list in front of you?

A. Yes, sir.

Q. Excluding the boilermakers helpers,—I believe you had fourteen helpers on the 13th, did you not?

A. Fourteen.

Q. You had thirty-three boilermakers, including in that thirty-three Mr. Hobbs, Mr. Precht, and Biggs, who were lead men?

A. That is about right.

Q. And with that crew of thirty-three men you followed on through. I believe you had no labor turn-over at all on that job with reference to the boilermakers. You only lost two or three men on that job, and that was because you yourself fired them?

A. I have not made any definite analysis of it.

Q. At that time when this contract was in progress there was a freeze order in effect where men

(Testimony of W. Lyle Borst.)

could not jump their jobs without taking a penalty of sixty days? They could not quit without a release, did they?

A. They did require a release.

Q. They were frozen on the job?

A. Well, that was perfunctorily so.

Q. Will you check your list from that time on and show me [592] if you have more than three or four changes out of that list of thirty-three? You increased your crew to this thirty-three man crew along in October, and I believe you layed off in October twenty-two, and you laid off the balance in December. Now, then, they all stayed on through, and you had this small turn-over; they were on the job regularly; they did not quit?

A. There was some absenteeism.

Q. Did you ever run a job before the war, Mr. Borst, in which you had as little turn-over as you had on this job?

A. So far as turn-over was concerned, I don't think this job is outstanding in that respect.

Q. Did you ever have as little turn-over as you had on this job? A. Yes, I think so.

Q. You worked ten hours a day six days a week?

A. Yes, sir.

Q. One shift?

A. Yes, but some considerable overtime over that number of hours, but basically that is what we worked.

Q. You worked on Saturdays sometimes, six days a week?

(Testimony of W. Lyle Borst.)

A. Yes, sir; and into the night and on Sundays.

Q. Will you tell me if in the entire time that there was more than one Sunday that you had a complete crew,—just one Sunday, possibly a few men once in a while, but one Sunday you [593] had a crew on the job? I think that was on September 3rd.

A. We did work long in the night, and the crew would come early or late.

Q. I am asking you now, Mr. Borst, if you at any time, except on one Sunday, had a crew there on Sunday,—I believe it is the September 3rd payroll, I think the last day,—does the payroll go to Sunday or to Saturday?

A. It goes to Sunday.

Q. It closes on Sunday? A. Yes.

Q. September 3rd was Sunday,—that was the only Sunday you had the organization at work as a crew? There was probably a couple or so working in isolated instances. I haven't check that.

A. No; I have not checked it either.

Q. But don't you know from your own recollection, Mr. Borst, that you didn't have any Sunday work?

A. I know that we worked on some of the work more than one Sunday.

Q. But so far as the boilermakers were concerned, check the September third and November fifth records, and I think the only time you find that they worked was on November fifth and September third, and November fifth lists Precht;

(Testimony of W. Lyle Borst.)

Mecum; Weiles; and Hartigan as having worked. Now, will you see if [594] I am correct on that?

A. What was the date?

Q. November fifth payroll.

A. That week shows Precht, Mecum, Weiles and Hartigan.

Q. No other boilermakers?

A. That is right.

Q. Now, Mr. Borst, would you go through your records on the boilermakers and show me any other instance when you had boilermakers working on Sunday except on the September 3rd payroll, other than the date of November 5th which I called to your attention?

Q. (Mr. Gibson, continuing:) Would it be easier during the lunch time to go through this record, Mr. Borst?

A. Yes; I am sure it would be.

Q. You understand the question?

A. Yes; I think I do.

Q. It was when they worked on Sunday, that is, with reference to the boilermakers. Will you check that? I find also that you only lost four or five men, and that you immediately replaced them, and that you had some thirty odd men [595] that you carried on through the job. Will you check your records and show me if that is correct, or if I am wrong in that?

A. Yes; I will do that.

Q. I call your attention to page 139 of the trial brief in which part of Exhibit No. 65 is set forth.

(Testimony of W. Lyle Borst.)

and that covers the overhead expense. The upper part of the page covers the jobs in progress between November 10th and December 19th by the plaintiff; the first one is the Sunflower Ordnance job,—is the Sunflower payroll for a certain date each week at which the payroll period ends? A. Yes.

Q. I think, if I understand it, it is for a period ending on a specific date, or day, each week?

A. That is right.

Q. And that day is always on Sunday?

A. Yes.

Q. The payroll goes for Monday, Tuesday, Wednesday, Thursday, Friday, Saturday and Sunday? A. Yes, sir.

Q. When did you usually pay?

A. On Tuesday or Wednesday.

Q. And up to the preceding Sunday?

A. Yes. [596]

Q. To midnight? A. Yes, sir.

Q. And the unit of time that you select in this exhibit is the end of certain weeks?

A. Yes, sir; that is right.

The Court: If this is something the Court should have in mind, I am afraid by the time the briefs are in and read, it might be a bit hazy. I think possibly it should be in the record.

Mr. Gibson: I think it is in the record as Exhibit No. 65 of the plaintiff. It covers the period of from November 10th to December 19th.

Mr. Watts: That is right.

Q. (Mr. Gibson, continuing:) You were arriv-

(Testimony of W. Lyle Borst.)

ing at the average number of employees per week for the purpose of arriving at some estimate of the proper allocation of overhead expense during that that thirty-nine day period; is that the purpose of this exhibit?

A. Yes, sir; that is right.

Q. Now, calling your attention to page 139, the first item there under the Sunflower Ordnance Works contract is 11-5,—that is on Exhibit No. 65. Mr. Borst,—11-5 100, what does that mean?

A. That would be the number of employees for that week. [597]

Q. You mean on the November fifth payroll?

A. Yes, sir.

Q. That covers October 29th to November 5th; is that the period of time ending November 5th?

A. That is right.

Q. Is there any doubt about that? A. No.

Q. Opposite that you have one hundred men?

A. Yes, sir.

Q. In computing that how do you put that figure in here, or why do you do that, the figure which goes back to November 5th, that is the week ending November 5th, which is five days before you started on this period for which you ask damages? Why did you go back to October in arriving at the average overhead, more than a complete week before the time you start to compute these damages? Why didn't you start on the 10th? Can you explain why you did that? If we are taking a period of time from the 11th of November to the 19th of Decem-

(Testimony of W. Lyle Borst.)

ber, should not you take the men on the payroll as of the 11th of November, and the number of men on the last day, the 19th of December, and use that as a computation instead of taking the payroll back in October?

A. That may be,—probably is, true.

Q. Isn't that because you had one hundred men at that time, and when you got to November you had dropped down some, or do [598] you have any explanation for that, Mr. Borst?

A. No, sir; I haven't, at the moment.

Q. The next payroll is 11-12, eleven meaning November, the eleventh month, and twelve meaning the Sunday, the 12th of the month. That is the date of the ending of the payroll, November 11th, being Saturday, and that is the date you claim that the extra overhead started,—not on November 10th, because your contract was to be closed, and you would take November 11th as being the proper date to begin the counting of men?

A. Yes; I would say that is right.

Q. You have 87 men listed for that date. Now, Mr. Borst, I would like you to check the record during the lunch hour and see if on November 11th you had only eighty men on that date to start this estimate with? A. Yes; I will check that.

Q. Now, I will pass that down to December 17th which is the last one you have listed so far as Sunflower is concerned. You have there 79 employees?

A. Yes.

Q. That is on the payroll of December 17th?

(Testimony of W. Lyle Borst.)

A. Yes.

Q. Now, hadn't you discharged everybody practically in the early part of that week, from the sixth on down, and by the 19th, hadn't you discharged everybody except some ten employees that stayed on the payroll from the 13th to the 19th [599] of December,—there were only a part of the men,—and on the 19th of December you had only ten employees, and here on this exhibit you have 79. Will you check and see if that is correct?

A. All right; I will do that.

Q. Now this figure totals 622, as the total number of employees that you claim were weekly employees, and that is divided by seven to give you an average of eighty-nine. That is a false figure now, because you admit here that the 100 on the first week in the exhibit should not be there at all, and subject to your checking on the other matters I have suggested as to the number you have on the payroll on November 11th, and the number you have on the payroll as of the 19th of December?

A. I will check those during the noon recess.

Q. Now then, will you turn to the preceding page, which would be page 138,—I am still talking about that exhibit No. 65,—did you, Mr. Borst, make trips during the period of this time from July 13th or 14th when you came on the job, up to the termination of the contract, and was it necessary to take trips away from there to supervise other work?

A. I made trips back to the office to report.

(Testimony of W. Lyle Borst.)

Q. Did you spend any time in connection with other jobs under your control at that time? [600]

A. There may have been a day or so that I might have been on some personal matters, too.

Q. I notice as a part of the extra expenses you have a figure of \$1,675.46, expenses for the first 120 days. That amount is \$1,675.46, from which you have deducted an arbitrary amount of \$418.86, leaving a balance of \$1,256.60, and under your expenses as listed you have various items there with no break-down at all, for instance, we will take the one on August 4th to 25th of \$250.25—was that a part of the expense of going back and forth to the home office, or do you have any recollection of those items? Have you any break-down or itemized expenses? A. Yes.

Q. I am calling your attention to the one of August 4th to 25th of \$250.25. What was that break-down?

A. Well, I had transportation there of \$70.00.

Q. Where was the transportation?

A. That was on the job. That was from the hotel to the site.

Mr. Watts: Explain what you mean by that "to the site."

A. Well, I was living in Kansas City, and drove back and forth each day. That was a total of fourteen hundred miles at five cents a mile. There was car storage also, and hotel, \$75.00, meals, \$47.50, and then I had entertainment items, [601] making up the balance, except for an amount of \$4.00.

(Testimony of W. Lyle Borst.)

Q. Now, let me call your attention to another item, September 16th to the 29th, \$230.61; is that of similar purport?

A. Well, that is car mileage, 840 miles, which would be \$42.00; there is storage of \$7.00; hotel, \$44.61; meals, \$27.00, and the balance is entertainment and miscellaneous.

Q. About how much entertainment and miscellaneous would that be?

A. About a hundred dollars.

Q. The next item—let us take November 3rd to the 6th, \$133.32.

A. This item transportation by car, 320 miles, \$16.00. There is an item of storage, \$1.40; the hotel bill, including entertainment, \$78.00, and there are meals for \$10.00, and another item of \$27.00 miscellaneous expense.

Q. Have you any items where you made trips back to the home office for reporting?

A. Not in this, I haven't.

Q. Didn't you expect when you came down if you would spend only thirty days out of the one hundred and twenty days on the job, didn't you expect to spend considerable time in running back and forth looking after other jobs? Wasn't that expected?

A. Well, yes; I would have been expected to make some [602] trips.

Q. The items of expense—I am not now in the position of quarreling with any of these, Mr. Borst.

A. I understand.

(Testimony of W. Lyle Borst.)

Q. Do you think this should be paid as extra damages? Do you think you should obtain damages for this?

A. Well, if I had not been there for that period of time I would not have spent that money.

Q. But you would have spent the money back and forth as you contemplated in your original estimate for this period of thirty days, at least?

A. There would be some travel.

Q. Now, in reference to the home office expense being proportioned, did you pay rent to the Fegles Construction Company for any certain space?

A. I don't know whether that was paid by direct check issued to the building management by the Power Service Corporation, or whether it was pro-rated between the two offices, but it is a definite charge on the books.

Q. Are you a stockholder of the corporation?

A. No, sir; I am not.

Q. During 1944, do you know whether there were any dividends declared, or paid, by the corporation? A. Stock dividends?

Q. Yes. [603]

A. To my knowledge, they did not pay any dividend on any stock. That is true, to my own knowledge.

Q. They didn't pay any in 1945?

A. No, sir.

Q. And in 1943? A. No, sir.

Q. Since your connection with the corporation they paid very few dividends?

(Testimony of W. Lyle Borst.)

A. That is correct.

Q. They haven't paid any in the last ten years, have they?

A. I don't know that they ever paid any.

Q. Do you think you would know if there was a dividend declared?

A. Yes; I think I would.

Q. You were furnished office space in the power house building? A. Yes, sir.

Q. You were allowed a telephone without expense for local service? A. Yes, sir.

Q. You had no rent to pay on the site?

A. No, sir.

Q. Counsel mentioned in one of his questions that causes [604] me to ask this question: The rejection of your claim by the Chief of Engineers is contained in a letter dated March 12th, 1946. Do you recall that date as being correct as to the date of rejection of your claim?

A. I would like to check that.

Mr. Watts: We admit that.

A. Then I guess it is correct.

Q. (Mr. Gibson, continuing:) That didn't come direct to your organization? It went through the channels and arrived in your organization a number of days later?

A. The letter would be marked as received in our office when it was received.

Mr. Watts: It shows a date of March 12th, received by the company March 15th, addressed to the Power Service Corporation.

(Testimony of W. Lyle Borst.)

Mr. Gibson: The time when that came to us was March 26th, by letter of transmittal.

Q. (Mr. Gibson, continuing:) On that job, Mr. Borst, it was contemplated under the contract that certain plans and specifications might be changed from time to time, and might involve additional, or less work? A. Yes, sir.

Q. If the work involved a change of plans and specifications that was incorporated in a change order? [605]

A. A work order, or a change order.

Q. I am coming to the work order later. There was a difference?

A. Well, the area officers made a distinction for accounting purposes, but we could not quite see what it was.

Q. A change order might involve a situation where, for instance, the contract might call for a certain kind of fitting, or a certain type of valve, and you found that particular type of fitting or valve would not be available. A change order permitting the use of some other comparable material, which was available, might be issued. That was a change order?

A. That may be true. As I say, the differentiation never was clear to me. It was originated by the other people there, and I accepted it.

Q. Now, change orders, Mr. Borst, did they sometimes involve an increase of money to you?

A. Well, I think either one might, a change order, or a work order.

(Testimony of W. Lyle Borst.)

Q. Well, there is another distinct document which is a work order?

A. There seems to be.

Q. And that involved a direction to you to do some additional work? A. Yes, sir. [606]

Q. And that would come about by consultation with you, and the engineer, or representative of Cory-Joslin in most instances?

A. It originated with the engineering office, and they sent us a description of the work that they wanted dealt with, and we would then prepare an estimate on that work and submit it back to the engineers through Cory-Joslin.

Q. Sometimes that involved only one item, or they might accumulate until you had several items, rather than write a letter every five minutes on this sort of thing?

A. I think that is right.

Q. I call your attention to a letter of August 24th, 1944, signed by Mr. Borst, yourself, to the Cory-Joslin people, do you recall sending that letter? A. That is right; yes.

Mr. Gibson: I offer it as Defendant's Exhibit "H".

(Whereupon document referred to was marked Defendant's Exhibit "H" for purposes of identification.)

Mr. Watts: No objection.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit "H" so marked for identification was admitted in evidence.)

(Testimony of W. Lyle Borst.)

Q. (Mr. Gibson, continuing:) Will you explain to the Court what that letter covers? [607]

A. Yes. This is in response to change order No. 1060, dated August 14th, covering ten extra work items necessary to complete changes in Hercules drawings, revised as of August 3rd, 1944. We quoted to them that we would furnish all the plant, equipment, labor, cutting, and welding materials, and perform all the work necessary to do the following extra work, and then the items were all listed there and prices were also listed.

Q. And the total amount of that was what?

A. The total amount was \$5,106.00.

Q. Now, Mr. Borst, under this change order amounting to \$5,106.00, was that approved after a discussion with the A-E-M?

A. Yes; I think that was approved within certain limits.

Q. And was incorporated in what was known as one of the modifications? A. Yes, sir.

Mr. Gibson: I am offering this so that the Court will understand the situation, and how this worked.

Q. (Mr. Gibson, continuing:) This modification dealt with a large group of these change orders based on your estimate, if Cory-Joslin would approve it, and the A-E-M approved it, and then the price was arrived at. The Area Engineer would approve it for the A-E-M, and in all these [608] matters you figured a margin of profit, did you not?

A. Yes, sir.

Q. You have no complaint now that you did

(Testimony of W. Lyle Borst.)

not work under this contract with reference to the changes in the plans and specifications, or the extra work directed by the Office of Engineers at a price you arranged? A. No, sir.

Q. That was the price you suggested, usually?

A. Yes, sir.

Q. The three modifications really covered a large number of change orders, all summarized under these three modifications? A. Yes, sir.

Q. The total amount of that ran something over eighteen thousand dollars? A. Yes, sir.

Q. There was a change order in reference to the header, I believe, which was, I remember now, \$114.00? A. Yes, sir.

Q. And that was included in one of these modifications? A. Yes, sir.

Q. There was another change order in reference to some water-wall tubes that involved one hundred thirty-seven dollars. That was in connection with some water-wall tubes, as I recall?

A. I don't remember that definitely, but the one on the [609] headers was a matter of relocating the header, or correcting a matter where there was a previous error.

Q. That is your signature, is it, Mr. Borst (indicating)? A. Yes, sir.

Mr. Gibson: I offer in evidence now Defendant's Exhibit "I".

(Whereupon document referred to was marked Defendant's Exhibit "I" for purposes of identification.)

(Testimony of W. Lyle Borst.)

Mr. Watts: I have no objection to any of these exhibits.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit "I" so marked for identification, was admitted in evidence.)

Mr. Gibson: This is a letter addressed to Cory, Joslin & Macnsons from Power Service Corporation, signed by W. Lyle Borst, Chief Engineer, and is as follows:

"Sunflower Ordnance Works,
October 24th, 1944.

"Cory, Joslin & Macnsons,
c/o William F. Lozier, Broderick & Gordon,
Sunflower Ordnance Works, DeSoto, Kansas.

"Attention: Mr. F. V. Wedlick.

"Re: Completion of Power House No. 1, Lump
Sum Subcontract No. 5.

"Gentlemen:

"In connection with the work of remodeling the Combustion Engineer Company water-wall tubes as required to take care of the error in the size of header holes, we performed some work with our own men."

Q. This was where the holes were different from the size of the tubes? A. Yes, sir.

Q. And that is what this letter pertains to?

A. Yes, sir.

Mr. Gibson (continuing:)

(Testimony of W. Lyle Borst.)

"The cost of this work we believe will be paid by the Combustion Engineering Company. The cost of this work amounts to \$137.95. We believe this figure can be written in on work order when it is processed.

Very truly yours,

POWER SERVICE CORPORATION."

Q. That is the way in which some of this extra work, this extra cost and extra charges was discussed, and arrived at, as the work progressed?

A. Yes, sir.

Q. That item was later on paid you in connection with Modification No. 2?

A. That is right. [611]

Q. (Mr. Gibson, continuing): Mr. Borst, during the noon hour what two items did you check on?

A. We went through the payroll records and made a tentative determination of the average number of employees day to day for the period mentioned.

Q. What period was that?

A. November 11th to December 19th.

Q. You made that check?

A. Yes; we actually had twenty-three hundred forty-six total and divided by thirty-three days, making an average of [615] seventy-one.

Q. That is instead of an average of eighty-nine that you had before?

A. Yes, sir. And we have introduced these figures into our computation; adding up the total

(Testimony of W. Lyle Borst.)

number of employees, we would then have a total of ninety-three for that period of time, which would result in a percentage of seventy-six to be allocated to this job instead of the eighty per cent which we showed, and which, in turn, would give us seventy-nine and one-half per cent as an average between the amount of money and the number of employees, which, in turn, would also reduce in our formula the amount of money to be paid from \$6,649.82 down to a new figure of \$6,486.63, and we also computed the number of employees on Sunday work.

Q. And,—

Mr. Watts: Will you read that into the record, Mr. Borst?

A. Yes. Our record shows August 6th, three men; September 3rd, 103 men; October 15th, three men; October 22nd, three men; November 5th, four men; November 12th, twelve men; November 19th, two men; November 26th, 69 men; December 3rd, thirty-nine men; December 10th, fifty-nine men; December 17th, ten men.

Mr. Watts: Were all of those dates you have just [616] read on Sunday?

A. Yes, sir; they were all Sundays.

Q. (Mr. Gibson, continuing): The computation you read covers the number of men working on the specified Sundays on the whole project; that included the whole job, brick-layers, boilermakers and all of the employees directly under your control?

A. Yes, sir; under the subcontract.

Q. And under your control? A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. Not just the boilermakers?

A. There might have been men on the boilers that were not boilermakers.

Q. Calling your attention to the boilermakers, in your payroll schedule, Mr. Borst, you have page one that starts out with "Office Employees," and your superintendents. I think then the piping superintendent? A. Yes, sir.

Q. Page No. 2 starts out with the boilermakers, I believe? A. Yes, sir.

Q. And then you skip a space and start with the boilermaker helpers? A. Yes, sir.

Q. And the subsequent pages take up the different crafts, [617] such as steamfitters, or some other craft? A. Yes, sir.

Q. The boilermakers, one can see by the term "boilermaker," as you look at the payroll?

A. Yes, sir.

Q. During this period of time continuously before September 3rd,—September 3rd was the day you had the large number working?

A. Yes, sir.

Q. Practically the whole force?

A. Yes, sir.

Q. And I asked you if November 5th was the only time you had any boilermakers working on Sunday. Will you tell us? I think you had four?

A. Yes; four is right.

Q. Now, do you mean to indicate that the record covers every Sunday on which boilermakers were working?

(Testimony of W. Lyle Borst.)

A. I didn't get to a particular craft. I took the total number of men on the project.

Q. Did you check far enough to see,—as you got to these men, the thirty-three boilermakers, exclusive of the helpers, with the exception of the four of these men that were involved in the turn-over, or just came off and on, you continued through with twenty-eight or twenty-nine men that stayed with you until [618] you terminated their employment?

A. We didn't get into that analysis this noon.

Q. The reason for this, Mr. Borst, is the question of turn-over, and having to break in new men. Now, Harry Precht started as lead man and was advanced to foreman, and continued as foreman straight through? A. Yes, sir.

Q. Mr. Biggs was lead man and then he continued on until some time in September when he resigned, and was immediately replaced by Mr. Mairs, and he continued as lead man until September?

A. I agree with that. I did not get into it at noon, however. We did not get that far into that phase of it.

Q. Now, then ten men on December 17th, was that your office force?

A. Some of them were.

Q. I believe you stated a few minutes ago that ten worked on December 17th? A. Yes, sir.

Q. And was that the office force?

A. Some of them were.

Q. You had only four laborers on the 17th because all of the crafts were dismissed?

(Testimony of W. Lyle Borst.)

A. Yes; these might have been key men. [619]

Q. I believe you had six people in your office force? A. They were probably there.

Q. You had four laborers besides that, and that was the ten you mentioned on December 17th?

A. That is probably correct.

Q. Now, glancing at that list, will you state whether or not outside of September 3rd when you had practically the full crew, all of this overtime was after November 10th?

A. Yes, a good portion.

Q. A good portion was after November 10th?

A. Yes; most of it was after November 10th.

Q. Will you follow that through now, Mr. Borst, and get that other information with reference to the number of employees I asked for before?

A. Yes, sir.

Q. Was it necessary toward the end of the contract prior to November 10th to have some clean-up men to keep the boilers operating and clean up the rubbish, to have the boilers fired, men working around there cleaning up?

A. Yes; we were working in that way. We were working on that work on Sundays as any other day.

Q. After you had,—strike that, please. Do you understand now, Mr. Borst, what I still wish you to check-up?

A. Yes; I think I understand. [620]

Q. After you had these defective headers that were repaired, or replaced, and the nipples welded onto the tubes so that they would reduce the header

(Testimony of W. Lyle Borst.)

size from three and a half inches to three inches, after these were delivered and all of the tubes were delivered on the job, was there any reason then for delay in your work in completing your contract?

A. No; we worked then as rapidly as possible.

Q. There was no reason to hold you back any further?

A. No; after this material arrived we were able to go forward.

Q. A man by the name of Neubauer, he was the man who succeeded Delbert C. Smith as power engineer on behalf of the A.-E.-M.?

A. Yes, sir.

Q. Do you remember of any conversation with him to the effect that the failure on your part to get the inventory on the steam generator equipment was one of the principal factors in delaying your completion of the contract? Do you remember that?

A. No, sir.

Q. Do you remember any discussion with Neubauer about it?

A. No, sir.

Q. Do you remember any complaint to you that your delay [621] in getting the inventory on the steam generating equipment was holding back the completion of your job?

A. No; I don't remember that Mr. Neubauer made any direct reference at all in any conversation to me.

Q. Now, from your own recollection, do you know yourself that the steam generating equipment inventory was very much delayed?

(Testimony of W. Lyle Borst.)

A. I don't think that was the case. It was a matter of what someone might have thought about it, but I don't think it was the case.

Q. There was some eleven items that you were relieved from completing when the contract was finished, that were turned over to someone else?

A. These units were in operation.

Q. I don't mean any big items,—the whole amount was about six or seven hundred dollars. There was some steam leaks and such?

A. Some steam leaks that had to be fixed, and rather than have us stay there, arrangements were made to take care of it at our expense. Those had to be fixed when they shut it down, and of course rather than have us wait for that it was agreed to have someone do it at our expense.

Q. As you progressed it appeared that the installation would not be completed by November 10th,—do you remember that [622] any discussion with the Area Engineer and the defendant in this action in which you were told that if one boiler was gotten into operation some time in the early part of December, or late November, it would not necessitate the extra,—

A. (Interposing): Mr. Gibson, in that respect we got that unit into operation in the time needed to fit their schedules.

Q. It wasn't before the tenth of November?

A. No, sir; it was in the interval between the tenth of November and December 19th.

Q. Have you a copy of the contract there?

(Testimony of W. Lyle Borst.)

A. Yes.

Q. What do you mean, Mr. Borst, by "premium labor?"

A. Well, it might be in terms of labor used under overtime or double time payments.

Q. You had straight time, forty hours a week, in which straight time pay is involved, and if you worked the men over that time you would have to pay a premium,—Mr. Borst, will you please look at me? I am sure that your counsel does not want to prompt you. The witness keeps directing his attention to counsel. Premium time comes about when you work these men overtime Sunday and Saturdays?

A. Yes, sir.

Q. Now during this contract, near the tenth of November, [623] was there not a discussion between yourself, a representative of the A.-E.-M., and the defendant in this case with reference to getting in as much as possible to avoid putting on any penalty time, and didn't you ask that they pay a premium, and you were told that if one of the boilers was in operation they could get along by keeping down the labor costs by operating only the one shift?

A. No, there was no specific conversation that I remember.

Q. There were several conversations with reference to getting this job done?

A. Yes; this Area Engineer, or his representative, Mr. Downing, came onto the job every day or two and Major Matthews came and discussed the project in general. My memory fails me just now

(Testimony of W. Lyle Borst.)

that anybody directed or suggested that procedure to follow.

Q. The general subject of conversation in all of these instances was when this job was to be done; wasn't that the principal source of conversation with Mr. Downing and with Mr. Matthews?

A. Yes; we did talk about it.

Q. Neither of them tried to penalize by demanding a double shift? A. No, sir.

Q. Now then, will you turn Clause 1-6 of the specifications [624] and look under subdivision (b) of paragraph 1-10,—I meant to say, turn to page 16, and to subdivision (b) of paragraph 1-10.

A. Yes; I thought that is what you meant, Mr. Gibson. I have it here.

Q. That clause reads: "The subcontractor shall furnish sufficient forces, construction plant and equipment, and shall work such hours, including night shifts, overtime operations, and Sunday and holiday work as may be necessary to insure the prosecution of the work in accordance with the approved progress schedule. If, in the opinion of the constructor, the subcontractor falls behind the progress schedule the subcontractor shall take such steps as may be necessary to improve his progress and the constructor may require him to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, all without additional cost to the constructor." You are familiar with that clause? A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. And you at no time instituted double shift work? A. No, sir.

Q. And very little of the whole time did you have any Sunday work except what you have told us here? A. That was all.

Q. Neither the defendant or the Area Engineer, or Project [625] Engineer tried to penalize you by putting in double shifts to get caught up with the work? A. No, sir.

Q. When you put in the progress schedule you knew that certain materials would have been required at that time to carry on that schedule, would they not,—when you presented the progress schedule you knew that the schedule was not being kept up?

A. At that time we knew that we were delayed on account of the tubes.

Q. At the time you put in the progress schedules you knew that they were not there?

A. That is right.

Q. And from the time you put in that schedule up to the time that you completed the job, you did not catch up with the schedule?

A. That is right.

Q. You were not penalized by the Area Engineer or the defendant, nor the Project Manager?

A. No, sir; they were entirely familiar with the conditions under which we were working.

Q. Periodically you were paid,—the plaintiff in this action got paid, I believe every month for the

(Testimony of W. Lyle Borst.)

preceding work, for the work completed during the preceding month? [626]

A. In general, that was true.

Q. That was the plan?

A. Yes; that was generally done.

Q. How did you and the defendant arrive at the sum of money due you at any monthly interval?

A. An estimate of the work as evidenced by the progress chart.

Q. The chart showing the actual amount of work completed, as distinguished from the schedule designating what you hoped to be completed?

A. It was paid on the estimate of the work that was evidenced by the progress chart.

Q. It was on this chart,—that was the basis upon which you were paid? A. Yes, sir.

Q. Now, isn't it a fact that the reason for a progress schedule is to determine how you were to be paid?

A. That was one of the functions.

Q. Without that there would be no basis upon which you could be paid for any period of work?

A. You would have to make an estimate of the actual value of the work done in some way or another there, by comparing the payroll to the total contract price, or some other mathematical operation. [627]

Q. Isn't it a fact that on all of those contracts they required a progress schedule to outline the proposed, or hoped for, method of doing the work, and the hoped for completion date, and, second, the

(Testimony of W. Lyle Borst.)

basis for determining the amount of pay that you are entitled to receive; aren't those the two reasons for the progress schedule?

A. The progress schedule, and the break-down of the contract price.

Q. Yes; that coupled with the estimate you arrived at of \$448,000.00? A. Yes, sir.

Q. You submitted one which was sent back to you, and then you sent another three days later with a better break-down that was accepted?

A. That is correct.

Q. You offered one, I believe on the 10th of August, which was not the first one you prepared but was the one accepted? A. That is right.

Q. Now, turn to page 1-4 of the specifications, Mr. Borst, and I call your attention to paragraph 1-05, entitled "Commencement, Prosecution and Completion." This is paragraph 1-05(a): "The sub-constructor will be required to commence work under the subcontract within five calendar days after the [628] date of receipt by him of Notice to Proceed, and will be required to prosecute said work faithfully and energetically and to complete the work within one hundred twenty calendar days, the time to be computed from the said date of receipt of Notice to Proceed, except as provided hereafter in this paragraph." You understand that paragraph, don't you? A. Yes, sir.

Q. Did you, in connection with this contract, consider that you were obligated by that clause in any manner?

(Testimony of W. Lyle Borst.)

A. Yes, sir. The clause was a part of the contract, and it was entirely recognized.

Q. And you did your best to comply with it?

A. Yes, sir.

Q. You had no objection to that clause, and you understood that in going along with the contract you accepted that as a part of your contract?

A. Yes; with the exception of the fact that I recognized that as a result of the material shortage situation we would never be able to make the one hundred twenty day completion.

Q. You used this as a basis of determining your claim for damages, one hundred and twenty days after the notice, and that is how you arrived at November 10th?

A. Yes, sir.

Q. You did adopt Paragraph 1-05 in your conduct— [629]

A. (Interposing:) Yes, sir.

Q. Paragraph 1-05, subdivision (b): "In the event the total payments for work actually constructed by the subcontractor under the subcontract exceed the original amount of the subcontract, the time for completion of the subcontract will be extended in the proportion that payments for work in excess of the original amount of the subcontract bear to the total original consideration of the subcontract. In case the total work actually constructed is less than the specified amount, the time for completion of the subcontract will remain the same as specified herein." You understand that paragraph, and understand what it covers?

A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. What do you understand that to mean, Mr. Borst?

A. In the event there had been a class of work added to the contract which would have required additional time, that the contract time could have been extended in direct proportion to the amount of money involved for this work, compared to the base amount of the contract.

Q. Where is there anything in there that requires extra time? Does that clause provide for extra money—that extra time will be added in relation to the amount of the extra contract work?

Mr. Watts: We object to that as incompetent, irrelevant [630] and immaterial.

The Court: I think I will permit him to answer, if he can.

Â. Well, in bringing the work into being and writing up the cost, and considerations for it, no time was established attributable to that particular work.

Q. In Modification No. 1, I call your attention to Paragraph four of Modification No. 1, which is attached to the main exhibit—I don't recall the number of the exhibit at this time—oh, yes; here it is, No. 21. I am reading to you paragraph four of page seven of the Modification: "It is understood and agreed that an adjustment of time for the additional work occasioned by this modification, if necessary, will be made at the time of final completion of all work done under the subcontract."

(Testimony of W. Lyle Borst.)

A. That is correct. We did not ask for additional time for that work.

Q. And the total amount of that extra work ran something over eight thousand dollars?

A. Yes, sir.

Q. Have you computed that into the original figure of \$448,000.00? A. Yes, sir.

Q. About five days is what it figured according to my figures?

A. Well, it would be about five per cent of the total time. [631] That would be about six days.

Q. Between five and six days, so that under that clause your real time of completion was November 15th instead of the tenth, except that you refused to accept it?

A. It had no effect on our time. That was done in step with other work.

Q. There was no penalty of so much a day, or week, for failure to complete on November 10th?

A. No, sir.

Q. The only penalty was to take you off the job and use your equipment and sue you on your bond for the extra cost to the Government?

A. That is right.

Q. You asked for extra time—that was not filed until around the 20th of November, even though it was actually dated on November 10th, so that the contract was completed at the time you were offered extra time and you refused it. That was in 1945, long after you got off the job?

(Testimony of W. Lyle Borst.)

A. That was written into this modification without any review by ourselves.

Q. That was on Modification No. 3 which covers the over-all picture, and you refused it?

A. That is right.

Q. There is no possible way, even though it was dated [632] back to November 10th, or if it had been dated back to the 1st of July, there was no penalty that could have been invoked for delay?

A. That is right.

Q. You insisted on not taking that extra time because you, as the plaintiff, believed that it might waive some right you may have for damages?

A. That is right.

Q. And that didn't come up until March or April of 1945?

A. The modification was submitted to us in February.

Q. And you rejected it? A. That is right.

Q. Calling your attention now, Mr. Borst, to subdivision (c) of Paragraph 1-05 of the Specifications: "When conditions at the site of the proposed work are considered by the constructor to be unfavorable to its prosecution, the constructor may order the subconstructor in writing to suspend work under the subcontract until the constructor considers that the unfavorable conditions for the prosecution of the work no longer exists. When the work is so suspended the time allowed for completion will be increased by an amount equal to

(Testimony of W. Lyle Borst.)

the time of suspension as determined by the constructor." You understand that clause, don't you?

A. Yes, sir.

Q. And under that clause your work was not suspended at [633] any time?

A. No, sir.

Q. Did you ask that it be suspended because of the absence of necessary material to make progress on the job?

A. No, sir.

Q. You had something to do there all of the time, did you?

A. Well, we paced the work to keep going.

Q. On two or three different days you had a little rain?

A. That is right.

Q. On one or two days it prevented you from keeping the men on the job; one was a big hole in the chimney and rain came in and you had to lay off the men?

A. I don't seem to remember that.

Q. There was no complete lay-off due to weather conditions?

A. No, sir.

Q. And you didn't think that conditions at the site justified a lay-off, or the suspension of work, for any period of time because of the absence of materials?

A. We didn't make that demand.

Q. Paragraph (d) of Clause 1-05 of the Specifications: "If the subcontractor fails to perform the work at a rate satisfactory to the constructor as specified in subsection (a) above by reason of delays in the delivery of materials [634] or supplies essential to such performance, because of war prior-

(Testimony of W. Lyle Borst.)

ities, or, because of conditions existing through no fault or negligence of the subconstructor, he may be excused for such failure upon the presentation to, and the approval by, the constructor of a written statement setting forth distinctly the causes for **such failure.**" You approved of that clause?

A. Yes, sir.

Q. And you followed it to the extent that you did ask for an extension of time in a letter of November 10th? A. Yes, sir.

Q. And you didn't like the next clause, so that in that letter of November 10th you objected to the provisions of subdivision (e), which I will read to you,—you know that, Mr. Borst?

A. Yes, sir; that is right.

Q. You accepted paragraph (d) but rejected paragraph (e) in that same letter?

A. That is right.

Q. Subparagraph (e): "In case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the subcontractor will accept the additional time in which to complete his subcontract, in full satisfaction of any delays encountered and the constructor will not be liable for any [635] costs or expenses incurred by the subconstructor as a result of the increased time for completion of the subcontract." That part of clause 1-05 you,—in that letter that you didn't want to include?

A. That is correct.

Q. Under this contract,—have you ever had one

(Testimony of W. Lyle Borst.)

where there was a penalty clause of so much a day if you didn't complete on time?

A. I was trying to think.

Q. During the war it was not the policy of the Government to invoke this clause?

A. I think that is right.

Q. And by the same token wasn't it the policy of the Government because of the possibility of delay to also waive liquidated damages in the event that the delays went beyond the time they anticipated? A. Yes, sir.

Q. They gave you additional time and you, in turn, accepted that time? A. Yes, sir.

Q. Subdivision (f): "Inasmuch as the provisions of the subcontract documents relating to the time for, and the rate of, performance of the work and the time for completion of the same are inserted for the purpose of enabling the United [636] States Government to proceed with the construction of the Sunflower Ordnance Works in accordance with its predetermined program of war effort, such provisions are of the essence of the subcontract." You understand that clause, Mr. Borst?

A. Yes, sir.

Q. Do you agree with that part of the contract, and were you in full accord in your operation with subdivision (f)? A. Yes, sir.

Q. And subdivision (g) of the same contract, which is 1-05: "No liquidated damages are provided for under the specifications, nor will such damages be provided for in the subcontract." That

(Testimony of W. Lyle Borst.)

clause, although it was in the specifications, you didn't agree with,—I will withdraw that, please. You don't consider that you are bound by that clause?

A. Liquidated damages, as a rule, are considered as against the constructor.

Q. Not liquidated damages.

A. As against the constructor.

Q. Under subdivision (g) which reads: "No liquidated damages are provided for under the specifications, nor will such damages be provided for in the subcontract." You mean [637] that no penalty would be invoked against you for failure to complete, and by you, I mean the plaintiff in this action?

A. Yes, sir; we understood that there would be no damages which could be assessed to us,—to the plaintiff.

Q. Against you, or in favor of you?

A. Against us.

Q. From the time you started on this contract and up to the modification was there any thought, or any belief, that Mr. Joslin had breached his contract in the matter of supplying these materials?

A. Yes; we thought so.

Q. You were on the job,—did you feel that Mr. Joslin had violated the terms of his contract?

A. Yes, sir, definitely.

Q. With reference to what?

A. With reference to the supplies or materials which would have been,—which were needed to per-

(Testimony of W. Lyle Borst.)

form the work in an orderly, proper and regular manner.

Q. And you felt that the procuring of the material was a burden placed on Joslin,—on the defendant in this case, and that there was no corresponding burden on you to get in the requisitions based on the inventory given by you?

Mr. Watts: That is objected to as being argumentative. [638]

The Court: He may answer.

A. That list of material was known to be on file and coming forward, just exactly as if it had been filed regularly, because in the verbal manner in which it was handled it was understood to be the same as if it was filed, by virtue of the entire understanding that was had. That material was understood to be on order.

Q. And for that reason did you look to Hercules, or to some other organization, to supply this material instead of Mr. Joslin?

A. We looked to Mr. Jung of the Joslin organization, or to Mr. Wedlick, who, in turn, were very definite in their statements that we would receive this material through those channels.

Q. You felt that excused from the performance of your contract?

A. I had gone along with the performance of my contract because as long as the orders were definitely established there was no detail for me to take care of, at least I thought that.

Q. Now, Mr. Borst, on this other matter, at

(Testimony of W. Lyle Borst.)

your home office do you have a switchboard operator,—a community operator, or do you and the Fegles Construction Company operate through different switchboards? [639]

A. We have a common system.

Q. You mean by that it is a common system where there is someone who acts as the operator and diverts the calls to the party it should go to?

A. Yes, sir.

Q. What part of the Fegles Construction Company's office is occupied by the Power Service Corporation, and what part is occupied by the Fegles Construction Company?

A. I would say, roughly, it is about half and half.

Q. And the equipment that you rent,—the Fegles Construction Company from whom you rented the equipment is the same Fegles Construction Company that occupies the quarters with you at the home office?

A. That is correct.

Q. Have you any record of the total amount of money you paid for rental of equipment during the time that you worked on the contract in question here,—not the thirty-nine days, but the full period of time, the amount that you paid in rentals?

A. Several thousand dollars. I don't have the figure here.

Q. Have you a fair approximation of it?

A. I would say ten thousand dollars.

Q. Do you have the figures so that you could get them and have the correct amount for us? [640]

(Testimony of W. Lyle Borst.)

A. I will try. I know there are some that are available to us here.

Q. I understand then that some of the figures are here? A. Yes.

Q. (Mr. Gibson, continuing): Were you able to check on any of the figures that we were talking about?

A. I think possibly I could get it tonight.

Q. I understood you to say, Mr. Borst, in your examination under Mr. Watts that the progress schedule showed when the delivery of material was required. Now then, have you a copy of this progress schedule?

Mr. Watts: Which one do you want?

Mr. Gibson: Anyone that shows the date of materials required.

Mr. Wats: Yes; we have them in our exhibits.

Q. (Mr. Gibson, continuing): Will you explain it as you go along? You are looking at a progress schedule now,—the one you have there is not dated, is it?

A. Well, the one from which this one was made was dated. This was revised on August 17th, in which we broke it down. It [641] shows here the operation in connection with the drums,—it is shown for boilers Nos. 1, 2 and 3. The operation requiring the drums,—naturally, the drums would have to be there back in July. I think it was about the 22nd,—no; I guess the 19th, and the boiler tubes would have to be there on the 19th of July.

Q. That was for what boiler?

(Testimony of W. Lyle Borst.)

A. Well, Boiler No. 1 is right here (indicating), and Boiler No. 2 is shown here (indicating).

Q. Boiler No. 2 would be on what date?

A. On the 21st, the boiler tubes for Boiler No. 2, —the 21st of July.

Q. That was your first proposal?

A. That was the revised proposal.

Q. Work on boiler tubes would continue from the 21st of July until what period, or, rather, during what period of time?

A. Until August 24th.

Q. From the 21st of July to the 24th or 25th of August, during which time your schedule called for work on Boiler No. 2?

A. On the tubes; yes.

Q. And now as to Boiler No. 3?

A. The tubes were to commence on the 5th of August, and continued until the 6th of September.

Q. And from that the schedules were made by the A.-E.-M.? A. Yes.

Q. Did those schedules conform with the designation, or limits placed by your proposal, or revised schedule of August 17th?

A. Yes, sir.

Q. Have you one of those here,—I believe Mr. Watts is looking at Exhibit No. 52.

A. We have this chart. All of the work is mapped under Boiler No. 1 in one space, and here (indicating) is Boiler No. 2 and No. 3, different arrangement than we used here (indicating). That shows the setting of the drums on July 19th, and

(Testimony of W. Lyle Borst.)

work on that boiler drums, tubes, water-wall and header tubes progressing through to August 23rd.

Q. Beginning on what date?

A. July 19th.

Q. That was Boiler No. 1?

A. Yes, sir; Boiler No. 1.

Q. Is it your contention that indicates the tubes should be there at the commencement of your operations, or sufficient tubes to work with?

A. We have that,—the tubes, yes. We didn't cover that before. We didn't reach that. This same chart I have here shows exactly when the water-wall tubes were to be there, the [643] exact dates when they were to be there are shown here (indicating). They are shown as August 1st, August 8th and August 15th on the three boilers, respectively.

The Court: Is this material,—doesn't the testimony show that there is no claim here until the latter part of August on account of non-delivery of these tubes?

Mr. Watts: No. Our claim was that they were due on August 1st to August 15th.

The Court: I am talking now about the claim for damages, whatever date that is. My recollection of the evidence was that the first claim for damages was, I believe, the 28th. I am not sure, but my memory is Mr. Borst read that from some exhibit, or, at least, there was some testimony to that effect. I cannot see why this testimony offered at this time is material.

(Testimony of W. Lyle Borst.)

Mr. Gibson: Well, if I may go on a little further with this questioning?

The Court: Yes, you go right ahead. I was just wondering about the record we are making here.

Q. (Mr. Gibson, continuing): Now, Mr. Borst, the progress schedule you referred to represents the date you proposed to start erecting certain segments of the work, and you allocated to that a certain number of days; isn't that what you put in a progress schedule?

A. Yes, that is, certain operations were delegated to [644] certain days.

Q. If that segment of work could be completed in a certain number of days that has no reference, or is no basis, for any fixed crew? It does not explain the number of men working on the operations in this schedule?

A. No; this was normally an exhibit of the allotted time.

Q. And whether that happened to be between the twenty-fifth of one month and the fifth of the next month, that schedule simply covers a certain amount of work that you proposed to do in a certain period of time? A. That is correct.

Q. In connection with this contract there is a term used as a "Punch List?"

A. That is correct.

Q. What is that?

A. That is a list made up by someone with authority showing items of work which are yet to

(Testimony of W. Lyle Borst.)

be done, or which are to be corrected in some manner.

Q. After the work is done and inspector comes from the A.-E.-M., or the defendant. Even after the inspection by the Government, if there is some deficiency in the work a punch list is made up and then you make up the work?

A. That is correct. [645]

Q. There were several items on the punch list?

A. Well, it was made up in this way: In order that all aid be given and cooperation had on the part of everyone, including the inspectors, the list was made up. Everybody knew that certain items of work had to be made up, and it was on the list. This was done in order that there would be no misunderstanding of what was necessary to fulfil the contract.

Q. In connection with this contract, except for the tubes,—the water-wall tubes and such, the rest of the materials were supplied to you in good time?

A. Yes, sir.

Q. They were delivered right to the place you ordered? A. Yes, sir.

Q. In fact, it got to the point in the construction of this work that you were getting deliveries so promptly that you didn't order until the last moment?

A. You say we did not order until the last moment?

Q. I say, it got to the point in the construction of this job that you were getting deliveries so

(Testimony of W. Lyle Borst.)

promptly that you didn't order until the last moment because of such quick and prompt deliveries?

A. I don't feel that was the case.

Q. I am talking now, Mr. Borst, about the standard items.

A. Well, that might possibly be an analysis of it. You [646] understand in a job of this kind there is a considerable amount of work done in keeping with good workmanship, and there is no written statement of such work. There is no detailed list made or used, and therefore you just go forward and do the work to the best of your knowledge and belief, if it is being executed in a good workmanlike manner. Of course in doing so you may have a certain amount of criticism and it may be justified criticism which may come from the overseer. He may point out, for instance, that it would be nice to have an additional bracket, or an additional hanger on a certain pipe line, or it may be that some piece of equipment is not set in a place that is the best, according to his judgment, and, of course, his criticism, as I say, may be warranted, and you just say, "Fine, we will do it as soon as we have the supplies, or we will get the supplies necessary and do it."

Q. Is that what you mean with reference to the forty requisitions after November fifth that were for certain items that you needed?

A. I don't get the distinction.

Q. Well, you say there are instances where the inspectors may ask for some change or some addi-

(Testimony of W. Lyle Borst.)

tional work as a cautionary measure, or to make the job better, and you order these items in order that you may do the work? [647]

A. Well, that may be true, and it may be that those instances are rather extensive, but I used a very simple illustration. You understand this may be in connection with some particular portion of the system, or it may extend to the entire system.

Q. Where there was additional work you got modifications so that you could get additional pay?

A. Well, not necessarily. It may come up in the inspection. You do the job, if it is a minor one, when the inspector suggests.

Q. But, Mr. Borst, if there is a question arises and you do not agree you have a right to ask for a determination? A. Yes, sir.

Q. That is, if you feel that it is outside of the scope of your contract? A. Yes, sir.

Q. There is no complaint at this time that any of that existed?

A. No, sir. I was simply pointing out that by reason of the way this is executed and the way it is handled, this situation giving rise to the question as to the absence of material and its coming forward,—

Q. (Interposing): Well, Mr. Borst, coming back to my question: Were not the supplies that were requisitioned delivered to you so promptly that you delayed in ordering [648] them until you actually needed them because of the fact that all

(Testimony of W. Lyle Borst.)

speed was given to getting the supplies to you on time?

A. No; I don't feel that there was any advantage taken of that situation, because it was to our advantage to keep the work ahead as much as it was to anyone's.

Q. I don't mean to imply that any advantage was taken, but simply that there was a whole-hearted cooperation in getting the material as promptly after the requisitions were filed as possible?

A. I would say that the defendant made every effort to get the material. I would want to point out that he did not always control the situation, but I would not want to say that the defendant was indifferent to the situation.

Mr. Gibson: I don't believe I have any further cross examination.

Further Cross Examination

By Mr. Scholz:

Q. Mr. Borst, just a question or two: The other day you stated to me that consideration for the additional clause was the continuation of the job. By that I understood you to mean that if this other clause was not added then you would refuse to do this further work. Was my understanding correct in that?

A. We did not make the statement that we would not do further work, but the inclusion of the clause satisfied us [649] on that point.

(Testimony of W. Lyle Borst.)

Q. You still don't answer my question. You said to me in answer to a question that the consideration for the additional clause was the continuance of the job, and I ask you by that, I understand you to mean, Mr. Borst, that the Public Service Corporation would not continue the job, or would not have continued the job unless that clause was added? Is that a correct interpretation of your statement, or not?

A. Well, it had a bearing.

Q. Was my interpretation of your statement correct, or not? A. Yes, sir.

Q. My interpretation is correct?

A. Yes, sir.

Q. Will you please show me any indication, orally or written, that you gave to the defendant, or for that matter, to anyone else connected with this, that you refused, that is, that the Power Service Corporation refused to go on with the work unless that clause was added?

A. No; there was no written expression to that effect.

Q. There was no written or oral indication that you would not go on with the work?

A. That is correct.

Q. The specifications, as they were written, are exactly [650] as they were intended to be written by the drawer of the specifications?

A. I don't understand that question, Mr. Scholz.

Q. The specifications, under which you submitted your bid and became a party to the contract,

(Testimony of W. Lyle Borst.)

they were written as the drawer intended them to be written, and you don't claim that the drawer made any mistakes in writing these specifications?

A. I maintain this: The man who drew these specifications was obliged to change them from the form he had originally written them in. These specifications were then adopted by the defendant, and therefore, the specifications as issued to the contractors, ourselves included, did not purport the thing which the original writing intended to purport.

Q. As I understand you, Mr. Borst, you contend now that the writer didn't intend to write the specifications as they are written?

A. He did not write them that way to start with.

Q. Do you have any knowledge, or, rather, did you have any knowledge of what the drawer had in mind at the time you bid on the specifications?

A. I did not.

Q. Whatever the drawer had in mind was something that you had information of after you had made the bid?

A. After we had completed the work. [651]

Q. Anything that the drawer had in mind did not effect in any way your bid?

A. It could not have affected the bid. I was bidding on the written specifications as they came to me.

Q. You acted on those specifications as they were at the time, did you not?

(Testimony of W. Lyle Borst.)

A. Yes, sir.

Q. Under the specifications you bid on,—strike that, please. Mr. Borst, the specifications which you bid on were the same specifications which are a part of the contract which you signed and operated under? A. That is correct.

Q. There are no changes? A. No, sir.

Q. The boilers were completed October 27th, 1944?

A. The boilers, as a whole,—the work as a whole, including the boilers, was all consummated at the same time, on December 19th.

Q. Were the boilers not completed before December 19th?

A. We had a portion, one unit, some time before that time, a considerable number of days before that time, but not all three of them.

Q. Did all of the work cease on the drums, the tubes, the water-wall tubes on October 27th, 1944?

Mr. Watts: We ask, if the Court please, that the witness be permitted to have a construction schedule.

Mr. Scholz: Surely.

A. May I have the final one? Of these charts?

Mr. Watts: This one?

A. The final date for setting the drums, the tubes, the water-wall tubes and headers appears on the final chart, and so marked as one hundred per cent on December 1st.

Q. (Mr. Scholz, continuing): December 1st, 1944? A. That is right, on boiler No. 1.

(Testimony of W. Lyle Borst.)

Q. Then the date of October 27th is incorrect?

A. That is right. I don't know where it comes from.

Q. If the work on the tubes, headers and drums ceased on Dec. 1, 1944, it was not necessary to have any equipment for the work after December 1st?

A. That was on Boiler No. 1. That date pertains to Boiler No. 1.

Q. I am speaking of all work on the tubes and headers, if that was not finished on October 27th? I understood you to say, however, that it was on December 1st?

A. On Boiler No. 1, it was, and on Boiler No. 3 this chart shows that it was completed,—the boiler proper, the tubes and headers on December 7th. That chart would bring [653] that fact forth.

Q. And what about Boiler No. 2.

A. No. 2 was completed on December 19th.

Q. Mr. Borst, did you understand that any material that was short, or missing, that you were to make requisition through Mr. Joslin for?

A. Yes, sir.

Q. And that the materials to be furnished would come through the Government?

A. Through the Government ordering and paying for.

Q. The Government was to furnish the material?

A. In the final analysis the Government was furnishing it; yes.

Q. Now, in regard to the claim of loss of effi-

(Testimony of W. Lyle Borst.)

ciency, those crews that you had were they skilled, or unskilled? A. Skilled crew.

Q. Now, these Quonset huts that are put up in two days, a crew will put the first one up in two days, and then possibly two or three days later they do it again in the same time. If the crew is skilled and they go to one operation, and then go somewhere else and do some other work, and then go back to the operation that would be like the first one, they would not increase their efficiency because they are skilled to begin with?

A. Your example is quite inadequate. [654]

Q. Well, that is the only thing that I know anything about. Now, these boiler crews are skilled to start with, and this second operation they are skilled at that, and they would not be any more skilled, no matter how many operations?

A. Well, familiarity and acquaintanceship that is gained permits a finer and a more able performance on the second operation, and so on, on the third.

Q. Before you started on the work you knew that the tubes and headers were missing?

A. Yes, sir.

Q. Isn't it a fact that without the inventory which was called for by the specifications, it was impossible to determine the material shortage?

A. The inventory showed the basic shortage, but here was the situation, Mr. Scholz—

Q. (Interposing:) Now, please, Mr. Borst, can you just answer my question yes or no.

(Testimony of W. Lyle Borst.)

A. Well, in that case the answer is no. We have a situation in which the material shortage was absolutely established. It was a definite factor. It was so determined and known to the defendant, in view of the fact that it was known to the people supplying the material to him. It was known by virtue of the actual listing of the material, [655] which was shown as never having been supplied under the original order. There is a deficiency established, a definite quantity of tubes and material that they had failed to supply, and that deficiency was established immediately.

Mr. Scholz: We move to strike that answer as not responsive. Without the inventory it was impossible to determine what material was missing and what the shortage was on the job. I think the answer is clearly not responsive.

The Court: I don't believe that it is responsive to the question, and I want to say to you gentlemen now that I think I know all about this. It has been gone over time and time again for days before the Court here, and I would say that possibly this answer is not responsive, and I think it should be stricken. We all know that the material was not there. It seems that it should have been apparent to anyone. The plaintiff knew it was not there; the defendant knew it was not there, and it seems to me that everybody else knew that it was not there.

Mr. Scholz: I believe that is all the examination I have.

(Testimony of W. Lyle Borst.)

Redirect Examination.

By Mr. Watts: [656]

Q. Will you please refer to Plaintiff's Exhibit No. 29 and tell the Court when the delay started on Boiler No. 1—what date?

A. We were up to the delay on Boiler No. 1 on August 1st, in view of the fact that the tubes were not there at that time, and did not arrive until August 17th, which was a sixteen day delay.

Q. That is exhibit No. 29?

A. Yes; it is.

The Court: I got that impression as to the delay. I thought it was from Exhibit No. 27.

Mr. Watts: This is Exhibit No. 29, your Honor.

Q. (Mr. Watts, continuing:) Was the job in any way delayed by reason of any of the requisitions that were filed by you after requisition No. 33?

Mr. Scholz: We object to that as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness. The requisitions speak for themselves. The plaintiff was required to file a material list.

The Court: I understood that there was no claim for damage under this requisition. I believe he may answer.

A. There was no delay on account of these requisitions. [657]

(Testimony of W. Lyle Borst.)

Recross Examination.

By Mr. Gibson:

Q. Now, Mr. Borst, in order to get our record clear, what do you understand that I asked you to check your records for?

A. The first item would be the labor turn-over for the boilermakers craft. I found that to be twenty-four per cent.

Q. I was asking for the number of people that you had on [658] the boiler payroll that started, and then dropped off the payroll before you terminated their work. The payroll shows that you laid off eleven men on October 11th, and then on the 21st of October something like fourteen people's services were terminated—they may have been terminated a day or two before that time, but so far as the payroll is concerned, at the right of the sheet—in the right hand column after the word "Term" which, no doubt, "terminated," it shows the date their work was terminated. Is that correct?

A. That is right.

Q. Now, Mr. Borst, you speak in terms of percentage. Let me ask you: Have you a list of the men who dropped off your payroll?

A. Yes; there are fifteen who dropped off the payroll.

Q. You are including the boilermaker helpers?

A. Yes, sir.

Q. The men who you expect to control the work, or to run the job, are the boilermaker superinten-

(Testimony of W. Lyle Borst.)

dent and the lead men—the helpers simply tote the material?

A. No; that is not true. The boilermaker's helper in the craft do just as much as the others, except that they are restricted from that pay allowed the boilermaker until they settle their relationship with the Union.

Q. Have you segregated your record to show the number [659] of boilermakers that terminated their work, as distinguished from boilermaker helpers? A. No; I have not.

Mr. Watts: We are prepared to give the names.

Q. (Mr. Gibson, continuing:) You haven't a list of boilermakers who terminated their employment from August 6th until you discharged them?

A. I have names, but I would have to go back and make the differentiation to show which classification it would be under.

Q. Would you recall as to which ones were boilermakers? A. No; not from memory.

Q. I will try to help you, Mr. Borst. How about Sam Manato? A. I have that name.

Q. He just worked a short time?

A. Yes, sir.

Q. Possibly a couple of payrolls?

A. Yes, about that.

Q. Now, how about Selva H. Green?

A. I remember the name.

Q. Was that a man that you have terminated his employ—he was there about six or seven weeks?

(Testimony of W. Lyle Borst.)

A. Yes, I have the name "Green," who would be terminated. [660]

Q. You didn't indicate in this instance where the man was terminated, or when, but it shows that he received no pay, so that when he was terminated in the middle of the week the payroll shows the date he was terminated?

A. It shows the days that he worked.

Q. Did you find where the name did appear there, and there was no record of his having worked? And no record of termination?

A. His name was on the payrolls, even though he didn't work. You see a man might have just gotten his last check and then didn't come back.

Q. And on payroll after payroll his name would be carried on? A. Yes, it is possible.

Q. And that happened with Selva H. Green, did it not?

A. I think so, but I don't remember exactly.

Q. Alvin L. Robertson—he terminated on the third of September?

A. Yes; he was terminated.

Q. As of the payroll of September 3rd, wasn't it? A. Yes; that is right.

Q. And Nelson Neicer, the record shows that he terminated on September 20th; is that right?

A. Yes; that is right, but I have the name here as "Napier," September 20th is the right date.

Q. Now, Mr. Borst, what do you understand by labor turn-over—what do you understand that term to mean?

(Testimony of W. Lyle Borst.)

A. Well, expressed in percentage the labor turn-over would be the number of men employed who left the job before they were terminated, divided by the total number of men on this entire job, that is, in the classification.

Q. That is the method you used to arrive at the figure, and that is the term "labor turn-over" as expressed by you? A. Yes.

Q. It is termed labor turn-over where he is working and his services are terminated, and you replace him, but if you continue without him do you consider that as turn-over? A. No, sir.

Q. Now, with the exception of the four names that I have read—oh, yes, and also Mr. Biggs, Edward A. Biggs terminated on November 2nd?

A. Yes, sir.

Q. Immediately after he was terminated you moved Mairs into his position? A. Yes, sir.

Q. Now, that was turn-over. You needed a man to replace him?

A. Yes; that was the lead man's job.

Q. You needed a man in that place, and he was replaced? [662] Now that is what I understand by labor turn-over. If you hadn't replaced him it would mean that the services were not required by you?

A. Yes; that situation was comparable to other instances—and those instances are easily determined.

Q. Outside of the four names that I read, plus the name of Reckline, and he was on the payroll

(Testimony of W. Lyle Borst.)

of August 6th and August 13th—now, with the exception of those men the rest of them on the boiler job stayed straight through?

A. I have here the helpers, as well.

Q. Now, on the helpers, something like seven of them that you developed stayed with you through the whole time—the balance of them came and went as you needed extra helpers. The balance of the crew were diminished and increased as you needed helpers?

A. I don't differentiate between the two classifications.

Q. Do I understand that your view is that the helpers, so far as breaking in a new crew was concerned, from one boiler to another, the increase of efficiency and so on, the boilermaker's helper was just as much a part of that crew in regard to efficiency as the men directing the operation?

A. They were working the same as the boilermaker, side by side. We are taking the entire crew into consideration. [663]

Q. Are you prepared now, or in a position to answer, whether, with the exception of the five names that I have read, all of the rest of the men stayed on the payroll from the time you took them on until you yourself terminated their services?

A. I could give you the names of the men from this record that I compiled who were not discharged, and who left the work—there are fifteen of them.

(Testimony of W. Lyle Borst.)

Q. And that includes the five names that I mentioned, and the rest would be helpers?

A. I haven't checked that, but I could do it.

Q. And from your compilation, or your checking, you arrived at the percentage of twenty-four?

A. That is right.

Q. And if I read the names of the men now you would not know whether they were helpers or boilermakers—you didn't pay enough attention to know whether they stayed through from the time you hired them until you terminated their employment?

A. I have the names of the people who were turn-over people.

Q. But you have a different view of turn-over than I have, Mr. Borst. My understanding is that when a man leaves your employment and you have to put another man in his place [664] that is turn-over, but when a man just drops out of the service and is not replaced that is a reduction of forces, and is to be expected. It is an expected hazard of any employment, but as I gather it that is not your view of turn-over?

A. Turn-over, as viewed from this situation, represents the number of men who leave the employment voluntarily. They ask for releases on the basis of sickness or something else, and it could be a justifiable release, but it is all men that leave the employment before we were ready for them to leave, and we would have used them continuously

(Testimony of W. Lyle Borst.)

if they had seen fit to stay. Those are all turn-over men.

Q. Your record is not segregated so you know just the number of boilermakers you had at any one time? A. No, sir.

Q. How long would it take to look the record over and see if out of the thirty-three boilermakers you had on August 6th—no; I believe it was on August 13th, and see if out of that group you lost only four by voluntary resignation, whose employment was terminated?

Mr. Watts: He and I worked on this until one thirty.

The Court: It seems to me it is a simple question, and I think Mr. Borst could answer that?

A. I don't know which fall in the boilermaker class and [665] which fall in the helper class. We would have to determine that first, in order to answer the question, and we would have to go back through and check.

Mr. Watts: Isn't it a fact, Mr. Borst, that the helpers perform the same work as the boilermakers?

The Court: That was not the question, Mr. Watts. I believe the question was, How many boilermakers terminated their services without being discharged. Now, if you don't have that information, just say so.

A. By going back through these records I can get this information.

The Court: Well, I guess perhaps you had better

(Testimony of W. Lyle Borst.)

do that. We have had time for everything else. I think we will take time for that.

Q. (Mr. Gibson, continuing:) Was there anything else you were going to look up? Was there any other item you were going to check?

A. We made a determination of the absenteeism.

Q. Was that with reference to the boilermakers?

A. Yes; and the helpers.

Q. All right. Do you have that?

A. Yes; we found that to be five and one-half per cent.

Q. Including both the boilermakers and the helpers? A. Yes, sir. [666]

Q. Now, Mr. Borst, so that we understand each other, I would like the greatest number of boilermakers at any one day, or I would like the day, or date that you had the greatest number of boilermakers, plus the total number of names—and you will find there are five of them—that were not on the payroll, that did not continue through until you terminated them, that is, of the boilermakers and helpers?

A. I think I can give that to you.

Q. Did you continue with all of the boilermakers except the five—did they continue through? I believe sometimes you had around twenty or twenty-one—that was about the most you had at any time?

A. That is right.

Q. Now, out of that group you lost seven that started with you, which were terminated at differ-

(Testimony of W. Lyle Borst.)

ent times, and you also terminated some helpers as soon as you didn't need them any further?

A. We didn't keep that record.

Q. Isn't there some rule, Mr. Borst, that you are permitted to have so many helpers to so many journeymen?

A. They allowed us to have all that were available on that job.

Q. I understand that they only allow one helper to two boilermakers, but no such rule obtained on this project?

A. That is right; no, sir, we had all that we wanted. [667]

Q. Now, Mr. Borst, let me ask you: Is Mr. Conkey the head of the active operation of Fegles Construction Company?

A. Yes, sir; he is the head.

Q. Mr. Fegles is away most of the time?

A. Yes, sir.

Q. And the next in the organization was Mr. Conkey? A. Yes, sir.

Q. He supervised the work?

The Court: I don't think there is any question of who was in charge of the Fegles Construction Company here.

Mr. Gibson: Very well. I will not follow that further.

Q. (Mr. Gibson, continuing:) I think you checked your record as to Mr. Manatom, Mr. Green, Mr. Robertson and Mr. Napier? A. Yes.

Q. And determined that they terminated their

(Testimony of W. Lyle Borst.)

services prior to the time that you terminated it, and Mr. Reckline also. He only worked a short time?

A. Yes; he only worked a short time.

Q. Now, Mr. Borst, will you go over that record and tell me whether any of your boilermakers terminated their services prior to the time you terminated them? A. Yes, sir.

Mr. Scholz: May I ask a question? [668]

The Court: Yes.

Examination by Mr. Scholz:

Q. Mr. Borst, you testified that you understood that for any materials missing, or short, that you were to make a requisition through Mr. Joslin?

A. Yes, sir.

Q. And one of your claims was because of delay caused by defective parts and tubes?

A. Defective parts.

Q. Well, the tubes, some were defective; a part of the claim was that you were delayed because of those being defective? A. Yes, sir.

Q. Those tubes were patented?

A. Those tubes—water-wall tubes; yes.

Q. By whom?

A. The Combustion Engineering Company.

Q. Were they the only ones that could furnish them? A. Yes, sir.

Q. You knew that before you made your bid?

A. Yes, sir.

Q. Now, referring to the defective parts, that is covered by Article Three on page 8-B of the con-

(Testimony of W. Lyle Borst.)

tract, next to the last line on page 8-B, which says: "Provided that the right of the [669] subcontractor to proceed shall not be terminated under this Article, because of any delays in the completion of the work due to causes beyond the control and without the fault or negligence of the subconstructor, including, but not restricted to, Acts of God, or of the public enemy, acts of the constructor, acts of the Government, including, but not restricted to, any preference, priority, or allocation order, acts of other contractors or subcontractors in the performance of contracts or subcontracts with the Government, or the constructor, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of the subconstructor's subcontractors due to such causes. In which event the contracting officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension." If there were any works there by other contractors or subcontractors, Mr. Joslin had nothing to do with that part? A. No, sir.

Q. And if there was work of the prime contractors, the Combustion Engineering Company, he would have nothing to do with that?

A. Yes; he was the supplier.

Q. You knew that at the time?

A. Yes, sir. [670]

Q. If there was work of other contractors delayed you made that fact known to the contracting

(Testimony of W. Lyle Borst.)

officer and he in turn would extend your time: isn't that your interpretation of the Article?

A. I am a little confused at the moment, but I will say yes.

Q. Now, I will refer to page 6-4 of the contract, to paragraph ten, and it states: "The manufacturer of the boiler equipment will furnish without cost to the subconstructor a consulting superintendent who will aid the subconstructor in the erection of their equipment," and then it goes on, "and on page 6-6 of the contract, in reference to the water-wall tubes it provides: "The furnace sides, front, rear, roof and gravity ash discharge from bottom shall be water-cooled with manufacturer's standard design. The surface of water-cooled furnace envelop is sufficient in area and proper location about the furnace gases to reduce their temperature,—" that was not just what I had in mind, but, however, you knew, Mr. Borst, before you made the bid that all these matters were in the specifications? A. Yes.

Q. Did you consult with the manufacturer of the boiler equipment in regard to your bid?

A. No. [671]

Q. Did you consult with them after you made the bid?

A. Their representative came on the job and naturally we did work with them in carrying out the work.

Q. How soon did the representative of the manufacturer come on the job after the job was awarded to you? A. About ten days.

(Testimony of W. Lyle Borst.)

Q. That would be around the eighteenth or twentieth of July, 1944?

A. Yes; I presume about that time.

Q. Anyway, the latter part of July?

A. Yes, sir.

Q. Did this representative come in voluntarily, or did you request him?

A. He came on voluntarily. We did not have to make a request for his appearance.

Q. If you had requested that before you made your bid, and had had a consultation with him, that would have given you the benefit of his knowledge?

A. I don't see right now what knowledge he could have imparted.

Q. I will ask that the question be read to you, Mr. Borst.

(Whereupon the following question was read by the Reporter: "If you had requested that before you made your [672] bid and had had a consultation with him, you would have had the benefit of his knowledge?")

A. Yes; we would have had the benefit of that, if we had talked to him.

Q. You also at times after you started work had five or six other experts on different phases of this contract of this work?

A. What was that question, Mr. Scholz?

Q. You also at different times after you started the work had the advice of five or six other experts on different phases of this work?

A. Advice from other people?

(Testimony of W. Lyle Borst.)

Q. That you could call for, yes, on different phases of the work?

A. The only one we could call on for advice was the engineer, Mr. Neubauer.

Q. On that construction work you had several experts that you could call upon while you were constructing the work?

A. In my own organization, I did.

Q. Outside of your own organization,—some of the different companies sent out representatives?

A. Yes; representatives came out in connection with the ash handling equipment. They came to check the installation [673] after it was made. That was a part of their service.

Q. And there were other experts came out on different phases,—in other words, a list was sent by the A.-E.-M. and the various manufacturers of people that you could call upon?

A. Yes, sir; we did have the soot blower people, and the ash handling people.

Q. You had this assistance?

A. Yes, sir.

Mr. Scholz: That is all.

The Court: Now, I would like to ask you a question, Mr. Borst: When did you first advise Mr. Joslin that you were claiming damages for failure to provide this material?

A. The actual claim as such was put in some time in February, 1945, the first actual claim for extra remuneration.

(Testimony of W. Lyle Borst.)

The Court: When did you first advise him that you were going to file that claim?

A. I don't think there was ever any definite advice, or statement, at any time that we would file a claim.

Mr. Scholz: I asked that question once. The first time was in December, 1945, which was a letter to the defendant.

The Court: That is all I have to ask the witness. [674]

Mr. Scholz: Inasmuch as the payrolls are mentioned here, I have certified copies of the payrolls and I offer them in evidence.

The Court: Do you have any objection to them, Mr. Watts?

Mr. Watts: None at all, your Honor.

Mr. Gibson: Defendant's Exhibits J, K, and L are offered.

(Whereupon documents referred to were marked Defendant's Exhibits J, K, and L for purposes of identification.)

Mr. Gibson: One page was torn off and I put it [675] in the Exhibit.

The Court: They may be admitted.

(Whereupon Defendant's Exhibits J, K, and L, so marked for identification, were admitted in evidence.)

The Court: And you may proceed with the cross examination of the depositions.

Mr. Scholz: I am now referring to cross examination of Eustis C. Clay, and to refresh your

Honor's recollection as to who he was, on direct examination he testified that he was employed by the Hercules Powder Company, Sunflower Ordnance Works, as Chief Expediter and Assistant Purchasing Superintendent. I am referring now to page twenty-four of the cross examination.

DEPOSITION OF EUSTIS C. CLAY

a witness for the plaintiff, deposed as follows:

Cross Examination

Question: I will ask you, Mr. Clay, if requisitions issued by the Power Service Corporation to the Hercules Company for materials were expedited by your office at the earliest possible delivery?

Answer: I never saw any requisitions from the Power Service Corporation.

Mr. Scholz: And now I go to near the end of the page:

Question: But if any such purchase orders had been issued [676] you would, of course, have expedited them for the earliest possible delivery, because you were in a hurry for this material, if you had got any order?

Mr. Watts: May I interpose this statement: Counsel has omitted several questions. The point I make is that he should not skip the questions that explain the answers. The questions and answers are referred to, and are:

“Question: You say there were none that you ever saw?

(Deposition of Eustis C. Clay.)

“Answer: None that I ever saw.

“Question: Were there any purchase orders issued by the Hercules Company that you recall?

“Answer: Purchase orders for what?

“Question: Any kind,—especially these tubes?

“Answer: There were no purchase orders issued for tubes, because they were contained in the original purchase order.”

Mr. Scholz: Now, I will proceed.

Question: But if any such purchase orders had been issued you would, of course, have expedited them for the earliest possible delivery, because you were in a hurry for this material, if you had got any orders?

Answer: If I had got an order, and it had been of [677] high urgency and required high priority, we would have instituted the proper method to procure that priority; yes, sir.

Question: Now, you say that Smith informed you that there was a shortage of materials, but at the time you had this conversation with him he didn't know what it was?

Answer: That is correct, sir.

Question: And also that he couldn't tell what it was until they did make an inventory?

Answer: That is correct.

Mr. Scholz: Now, I will skip down to about the middle of the page,—let's see,—I skipped one, two, three questions.

Question: With this pile of material that there was, there wasn't any way of determining just what

(Deposition of Eustis C. Clay.)

the shortages were until they did make such an inventory; is that correct?

Answer: Originally, the assumption was that it had all been delivered.

Mr. Scholz: And Mr. Joslin made a statement in there as follows: "That doesn't answer the question." And then the answer continues:

Answer: But, as I learned from Mr. Smith, it was customary to make sure that transfer of materials out of that stack of stuff to other parts of the plant where it might have been needed might show up a shortage. [678]

Question: But as a matter of fact, nobody could know for sure whether there was a shortage until you had actually,—somebody had actually made a physical inventory of materials that were there?

Answer: I presume that is correct.

Mr. Scholz: Now, unless there is an objection, I will jump to page twenty-nine, ten lines down the page:

Question: Did you ever receive a schedule prepared by the Power Service Corporation?

Answer: No, sir.

Mr. Scholz: I will skip the next question.

Question: Had you ever heard that a schedule was prepared by them as approved August 22nd, 1944?

Answer: No, sir.

Question: Did you ever see any directive that was sent to proceed with the completion of Power House No. 1?

(Deposition of Eustis C. Clay.)

Answer: Not to my recollection.

Mr. Scholz: Now, I will skip over to the next page, page No. 30, the second question on that page:

Question: Now, do you believe that it would have been possible in any way to secure these tubes at any earlier date than you actually did get them?

Answer: So far as I know, it would not.

Mr. Scholz: That is all of the cross examination [679] I care to introduce.

Mr. Gibson: That is all of our cross interrogatories.

March 27th, 1947, 11:05 a.m.

Mr. Gibson: Last evening I went through the cross examinations on these depositions and tried to clean out from the record everything that I didn't think was explanatory. Now, the first is the cross examination of Emil Nelson. He was the construction superintendent for the Power Service Corporation. The part I am reading starts at the bottom of page No. 16 of the deposition, which also contains his direct testimony.

DEPOSITION OF EMIL NELSON

a witness on behalf of plaintiff, deposed as follows:

Cross Examination

Question: And your general duties were what? Would you say?

Answer: Supervising erection and taking care of all the labor.

(Deposition of Emil Nelson.)

Mr. Gibson: Now, I will skip to the lower part of page eighteen:

Question: Did you participate in the making of the inventory by checking materials on hand at this Ordnance [680] Plant site?

A. I was supervising that.

Question: You were supervising that?

Answer: So I had a man checking it.

Question: So that you were really in charge then of that particular job?

Answer: That is right.

Question: Did you keep a record when the so-called inventory check-up was commenced?

Answer: Well, that was at first, as soon as the job started, we started, yes, sir.

Mr. Gibson: I am now continuing at the top of page nineteen:

Question: And that would be about the first work that you were assigned to?

Answer: That is right. One of the first things I started with.

Question: And can you state as to whether such inventory was completed?

Answer: Oh, I would say it took us about thirty days before it was actually completed, all of it. That means valves, and other things, besides what belongs to the building.

Mr. Gibson: Now, I am skipping from page nineteen to page twenty-eight: [681]

Question: After the tubes and headers were delivered, was the force of the plaintiff company in-

(Deposition of Emil Nelson.)

creased to take up any slack because of the delay in delivering such material?

Answer: Well, we put additional men on; yes, sir.

Question: Would you say now how many additional? Answer: I don't remember; no.

Mr. Gibson: That is all so far as Mr. Nelson's cross examination is concerned. I am now taking up the deposition of Mr. C. Howard Murphy. The Court will recall he was employed by the A.-E.-M.

DEPOSITION OF C. HOWARD MURPHY,

a witness on behalf of plaintiff, deposed as follows:

Cross Examination

Question: If your answer to Interrogatory No. 5 is that you did something in connection with the specifications, then who directed the preparation of the specifications for the erection of Boilers in Power House No. 1?

Answer: J. S. Hagan, Chief Engineer of the A.-E.-M. Engineering Division.

Mr. Gibson: That is all of Mr. Murphy's cross interrogatories; and now I go to the cross examination which I wish in the record of L. J. Neubauer. He was first employed by the Hercules Powder Company and later on by the A.-E.-M. [682]

Mr. Watts: That is correct.

Mr. Gibson: Starting on page ninety:

DEPOSITION OF L. J. NEUBAUER,

a witness on behalf of plaintiff, deposed as follows:

Cross Examination

Question: And what time in 1944 did you get to the Sunflower Ordnance Plant?

Answer: I came in July.

Question: What time in July?

Answer: I think it was about the middle of July, about July 15th.

Question: Would your records show?

Answer: Yes; I think they would.

Question: Up to that time you hadn't been working on the site of the Sunflower Ordnance?

Answer: No.

Question: And then you wouldn't know what material there was on hand for these boilers, would you, at that time?

Answer: No, sir; I would not.

Question: It wasn't a part of your responsibility, was it, to check by inventory, or otherwise, the amount and nature of such material?

Answer: No, sir; it was not.

Question: Is it your claim that you saw,—I believe you [683] said, three sheets of paper that represented material that was short?

Answer: Yes, sir.

Mr. Gibson: I now go to page ninety-four:

Question: Now, as to how much of the material which may have been on hand at the time the standby order was given and how much material there was on hand at the time that the bids were opened, you wouldn't know, would you?

(Deposition of L. J. Neubauer.)

Answer: No, sir.

Question: And as to how much of that material was on hand when the contract in that case was let, would you know?

Answer: No; I would not know.

Mr. Gibson: The purpose of offering this is to clear up some rather broad statements made by this man in direct examination. He did not even go on the job until after the contract was in force. That is all of Mr. Neubauer's cross examination I wish in the record. The next is the cross examination of Mr. F. V. Wedlick. He was the Project Manager for Cory-Joslin, the defendant in this action, and acted during the absence of Mr. Joslin. On page No. 7 of the cross interrogatories,—and I am starting at question No. 8:

DEPOSITION OF F. V. WEDLICK,

a witness for the plaintiff, deposed as follows:

Cross Examination [684]

Question: Did Mr. Borst present to you the clause which was finally added to the contract before it was formally executed?

Answer: I don't remember.

Question: If your answer to this question is "yes," were you advised by Phillip A. Dergance, attorney for the general contractor, that this clause did not add anything to the contract?

Answer: I was so advised.

Cross-interrogatory 9-A: If you were so advised, did you sign the additional clause based upon this advice? Answer: Yes.

Mr. Gibson: That is all with reference to Mr. Wedlick. I am now about to read from the cross examination of Colonel E. E. Taylor, who was the Area Engineer for the contracting officer at the time the proposals were being compiled, and the specifications arranged and the bids requested. The second question on page fifty:

DEPOSITION OF COL. E. E. TAYLOR,

a witness for the plaintiff, deposed as follows:

Cross Examination

Question: Did you have anything to do with the acceptance of the bids? Answer: I did.

Question: And at that time the Cory-Joslin-Macnsons were [685] contractors on that project of a large number of buildings; is that right?

Answer: They were the Fixed Fee contractors for the mechanical work.

Question: And the determination that Power House No. 1 was to be sublet was a matter not left for their determination; is that right?

Answer: The determination was made by me after consultation with Cory-Joslin and with the A.-E.-M.

Question: And I believe you testified that this construction of Power House No. 1 was such that it would readily lend itself to construction at a lump sum, or unit, basis; is that right?

Answer: I believe I testified that the installation of the boilers and equipment in Power House No. 1 was such that it lent itself readily to a lump sum unit price contract.

(Deposition of Col. E. E. Taylor.)

Mr. Gibson: The United States Attorney's office took this deposition on behalf of the defendant. I will continue with the next question:

Question: Up to that time whose responsibility was it to furnish the materials for the project as a whole? Was that the Hercules, or the Combustion Engineering Company?

Answer: When you refer to the project as a whole, do you refer to the power house?

Question: Power House No. 1. [686]

Answer: It was primarily, as far as I was concerned, it was the responsibility of Hercules to furnish the material, and they, in turn, had a contract with Combustion Engineers for the materials.

Mr. Gibson: Skipping to page fifty-two, toward the bottom of the page:

Question: Who did you say is the one that prepared the specifications for this subcontract?

Answer: I would say that the specifications were prepared by the Engineering Section of the Architects, Engineering, Managers Office.

Question: And did you collaborate in connection with the provisions, the phraseology, or any feature of these specifications? Answer: Yes.

Question: Had the specifications been agreed upon at the time that bids were requested?

Answer: Yes, I am sure they were.

Mr. Gibson: And now continuing with the cross examination toward the top of page fifty-four of the deposition:

Question: Did you collaborate in connection with the wording of this paragraph (b) of 5-04?

(Deposition of Col. E. E. Taylor.)

Answer: I can't say that I can remember that I collaborated in any particular paragraph in these specifications. I had [687] collaborated in the preparation of the specifications as a whole.

Question: Would that also be true of the paragraph following, which is designated as paragraph (c)? Answer: That would naturally follow.

Question: And in connection with the submission of bids, were specifications furnished to parties from whom bids were solicited?

Answer: They were furnished to all bidders.

Mr. Gibson: I am now turning to the bottom of page fifty-seven:

Question: Was there any consideration given by you when these specifications were prepared as to the length of time that the contractor would have after receipt of a requisition for materials within which such materials shall be supplied, or delivered?

Answer: No specific time. The project was considered as a whole, and it was considered that one hundred twenty days would be ample time in which to expedite the materials and get it on the job.

Mr. Gibson: And now the next question is toward the bottom of page fifty-eight:

Question: Are you familiar with the type of construction involved under this contract as to whether or not the installation of tubes and headers are of the most essential items, and [688] first needed after the boiler steel is erected, and the drum set in place?

Answer: I would say that they were.

(Deposition of Col. E. E. Taylor.)

Question: Would it then be reasonable to expect that the tubes and headers would be the first items inventoried and requests issued for any material found to be missing?

Answer: I would assume that that would be among the first items to be requisitioned if found to be missing.

Question: Would you say on a project such as this that after the drums, tubes and headers were in place and all of the material on the job was available that there could be any reasonable excuse for the subcontractor failing to maintain his construction schedule thereafter?

Mr. Gibson: There is an objection in the record by Mr. Watts which I will read:

"Mr. Watts: I object to that as argumentative, and based on no facts in the record in this case, and calling for a conclusion of the witness, too."

Mr. Watts: I will withdraw that objection, if the Court please.

The Court: Very well. He may answer.

Answer: It would all depend on whether those materials referred to were on the job.

Question: I mean after they were on the job and installed [689] from that time on, and all materials required were on hand?

Answer: It would still depend on how much of his scheduled time had been used up in securing those materials, and how much of his scheduled time was left in which to complete the job.

Question: And if his scheduled time was less

(Deposition of Col. E. E. Taylor.)

than had been formerly anticipated, and the time limit of one hundred twenty days was of importance, would it be natural that the force would be increased to expedite the work that remained?

Answer: It would be necessary to increase the force in order to accomplish it.

Mr. Gibson: Now, I am skipping from page sixty to page sixty-five: This is redirect examination that I am reading from,—and do you have any objection to my reading it?

Mr. Watts: I have no objection to the direct examination, the cross examination, or the redirect examination.

Mr. Gibson: Very well, I will read this. I have just this one question I would like to read:

Question: Colonel Taylor,—or, Mr. Taylor, on cross examination inquiry was made of you about the time it would take for tubes and headers to be delivered after order was made. State whether or not it was the intention of all parties concerned at the time the bid was made, or the understanding that the tubes and headers were already at the site, and were not to be ordered, or fabricated thereafter? [690]

Answer: I don't remember that any contention was made as to just what materials were missing.

Mr. Gibson: That completes all of that part of the testimony of Colonel Taylor that I wish to read. That completes all of the testimony I offer. Now, my recollection is that you have not offered the deposition of the Vice-president, Mr. Conkey?

Mr. Watts: No; there were only a few questions in that.

Mr. Gibson: Then that is all at this time.

Mr. Watts: That is all. The plaintiff rests.

The Court: Do I understand now that the plaintiff has rested as far as his case in chief is concerned, except for the answer to one question from Mr. Borst?

Mr. Gibson: I think there were two questions that he was answering after he had checked on certain matters.

The Court: Very well.

Mr. Scholz: We want at this time, if your Honor please, to renew our motion for judgment on the pleadings. We filed the motion for judgment on the pleadings, and Judge Roche denied it without prejudice. We renewed it at the beginning of the trial, and your Honor took it under advisement, and we want to renew it at this time, and we want also to make a second motion for a non-suit, and in stating the grounds for [691] a motion for a non-suit, I shall make it as brief as I can. On June 14th the Power Service Corporation received the specifications and an invitation to bid on this job. On June 18th and 19th, I believe it was,—at any rate, it was a part of two different days that were spent by Mr. Borst in a physical inspection of the project on which to base a bid. He was accompanied by two members of his organization to the site of this project. On July 7th the bids were submitted by the Power Service Corporation. On

July 11th the contract was awarded. That is the date of the contract. On July 13th Notice to Proceed was received by the Power Service Corporation. Now, we believe that is practically the story. There was an offer and an acceptance which constitutes a contract. Under the specifications which the plaintiff had prior to the making of this bid, and upon which the bid is based and upon which it was accepted by the defendant here, the plaintiff acknowledges in paragraph 1-05 of the specifications, and it was fully understood, that any delay encountered by reason of late delivery of material that Joslin, the defendant, would not be held for any expense because of any increase in the time of completion of any of the work, and in turn, the contract does not say that the plaintiff would be penalized for any delay,—

The Court: (Interposing) Now, would you just [692] confine yourself to placing the motion in the record without any argument at this time? I will hear argument on all of these questions later.

Mr. Scholz: Very well. The grounds for the motion are:

First: That there is no evidence adduced to show any breach of contract by the defendant;

Second: That the plaintiff is barred from any claim for damages as alleged in the complaint;

Third: If he is not barred by the specifications, Paragraph 1-05, then he is barred by the additional clause on the contract;

Fourth: There is no consideration for the ad-

ditional clause on the signature page of the contract, which was later added;

Fifth: There is no ground for a reformation of the contract. It is agreed that there is no fraud involved. It is my understanding that it is based on mutual mistake, and there is no evidence here of any mutual mistake, or mistake of one party which the other knew about. I will say further that there is no ground for the reformation of this contract because there can be no mistake if the parties understood,—

The Court: If you have finished with the grounds [693] of your motion, Mr. Scholz, I will say that at this time it is my inclination to overrule this motion and take the testimony on behalf of the defendant, because I would like to give this matter serious thought.

Mr. Scholz: I was just going to say that the mistake must be such that the parties could not have obtained knowledge thereof when put on inquiry, and that any mistake must relate back to the time of the instrument,—that the instrument says one thing when the parties intended it to express another; that carelessness, negligence is no ground for reformation. That the contract did not assure the plaintiff that it might not be delayed due to causes outside of the contract, nor do acts of the Government constitute a breach of the contract as to this defendant, and that the plaintiff did not show here that he was diligent, and he did not show why he did not avail himself of the sources of which he had knowledge, nor does he show that he could

have obtained this knowledge by reasonable diligence, had he investigated. It is admitted that there was no misrepresentations made by the defendant,—

The Court (Interposing:) I will say to you, Mr. Scholz, that I consider there are some very interesting questions raised by the motion, and in order that the Court may have ample time to consider this the motion at this time will be over-ruled. [694]

Mr. Gibson: May I say,—

The Court: Do you wish to argue this matter now, Mr. Gibson? I am limiting my ruling at this time, and I will say that I am over-ruling this motion, and requiring the defendant, if it is the desire of the defendant to do so, to continue with their case, that is, with the defense to this complaint in its entirety, but I am doing this with the understanding that I am reserving the ruling to the extent that the motion may be renewed again at the close of the case if it is desired, and at that time the Court will, when deciding the entire matter, decide the questions that are raised by the motion. I would like to have the matter presented on briefs very fully. What I am trying to avoid now, is to make a definite ruling on this matter. I would like to hear fully from counsel in their briefs.

Mr. Scholz: The only reason I make this is to preserve our record.

Mr. Gibson: I think it is a very proper motion to be made at this time.

The Court: I feel the same way. I think it is a proper motion, and I think it has some nice ques-

tions presented, and I want to say this: I think if you gentlemen were in the Court's position you would want a full opportunity [695] to have all of these questions presented to you.

Mr. Gibson: That is true.

Mr. Watts: I agree with the Court on that.

Mr. Gibson: I assume that the motion made by Mr. Scholz is as to the three counts in the complaint, and I want to state that I have a particular ground, or, rather, would like to impress the particular grounds for the motion for judgment for the defendant on Count One, and to say that it is not only a renewal of the motion on the ground of failure of consideration for the clause added, but that the clause itself adds nothing to the contract. I think I understand that the interpretation placed on the contract by the plaintiff is that it is signed and executed by the Power Service Corporation without any intent on the part of the Corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials, notwithstanding the provisions of Paragraph 1-05 of the specifications. It is our contention that it adds nothing to the contract. If it is considered that it does add something to the contract by this clause, then, of course, there is no basis left in the contract for determining the delays, because the paragraph which they are objecting to is the only paragraph in the contract, or the specifications, that says anything about when it is to be completed, and it follows that without that [696] paragraph then there is no way to

make any determination as to whether there was a delay. It is defendant's contention that if you take this contract and say: "I am going to use this first part of the contract, but I don't like the rest of it,"—the time is fixed in Paragraph 1-05 as one hundred and twenty days. It seems to me that they cannot start from that point and calculate any damages, because, as I say, they cannot take the first part as a basis, or any basis of their contract and say, "I will accept that, but I don't like the rest of it." I am wondering, your Honor, if I have made myself clear on this.

The Court: I think you have, Mr. Gibson, and, as I said after Mr. Scholz' remarks, I would like to consider this matter fully. There are some nice questions involved, and I might say again, without any thought of finally ruling on this matter, I will keep my mind open, of course, but it seems to me that the contract as originally drawn, which includes the clause that is added to it, is very plain and complete, and I cannot right now see any necessity for any reformation of this contract. I think it is easily interpreted as drawn. Of course, I may change my mind on this. The only question that I have no thought at all on at this time is whether or not the contract was completed prior to the signing of it. It is understood by all of you gentlemen [697] now, is it not, that the motion is over-ruled, with the reservation that the Court will reconsider it in ruling on the matter finally, that is, in making a final determination of the entire case?

Mr. Gibson: That is understood by us; yes.

Mr. Watts: That was my understanding.

Mr. Gibson: We will call Mr. Joslin.

WILLIAM EDWARD JOSLIN,

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Gibson:

Q. Your place of business is where, Mr. Joslin?

A. 509 Polk Street.

Q. And your residence?

A. 611 Miner Road, Miranda, California.

Q. You are the defendant in this action?

A. Yes, sir; I am.

Q. You operated during the time covered by the allegations in the complaint filed in this matter under a fictitious name? A. Yes, sir.

Q. You operated as an individual under a fictitious name? A. I did.

Q. And what was that? [698]

A. Cory, Joslin & Macnsons.

Q. That is the name under which you operated?

A. Yes.

Q. But it is not the name under which you operate in San Francisco, is it?

A. I do not; no, sir.

Q. How did that become your operating name at the Sunflower Ordnance Project?

A. Well, the Macnsons Company was a local firm and prior to the Sunflower Ordnance job we

(Testimony of William Edward Joslin.)

worked as a joint venture on numerous jobs. At the time consideration was first given to the Sunflower plant in DeSoto, Kansas. I was called back for consultation. I proposed to take Macnsons in on that, and at the start of it, or during the negotiations Macnsons procured some additional work at San Diego which work prevented them from taking part in this project, so I took it in my own name.

Q. You mean you took the work individually?

A. Yes.

Q. Did Macnsons move out before the negotiations were finished?

A. Yes, but all of the stationery and so forth had been printed, and rather than cause the expense of reprinting the stationery we continued on under the name. [699]

Q. But you were the sole operator?

A. I was the sole individual concerned.

Q. You are identified, I believe, some place as the president of Cory, Joslin Company?

A. I am.

Q. They are not involved here?

A. They are not.

Q. What is your business?

A. Mechanical and electrical contractors, and contracting engineers.

Q. In 1942 what was your occupation or business at that time? A. The same business.

Q. Are you a member of, or associated with, any national organizations or societies?

(Testimony of William Edward Joslin.)

A. I am presently associated with the National Association of Master Plumbers; the National Association of Heating, Piping and Air Conditioning Contractors; the American Society of Sanitary Engineers; and the Society of American Military Engineers.

Q. Are you familiar with power house construction as it pertains to boiler construction?

A. I am.

Q. Will you state some of the jobs that you have had the [700] contracts for, or have worked on?

A. The power house at the Alameda Air Station; a power house at Fairbanks, Alaska; a power house at the Remington Arms Plant in Salt Lake City, Utah; and at Mare Island, and at Hunters Point, and at Alrock Field, Panama, and the power house at Sunflower, in addition to a number of others.

Q. Did you supervise any power house jobs other than those on which you had the contract?

A. Oh, yes; I have.

Q. Will you state some of those that were under your supervision?

A. Well, there was the Pacific Fruit plant at Nampa, Idaho; the Ford plant at Richmond, California; the LaGuna-Honda and the Handhome and others.

Q. Did you hold any designated position on these construction jobs?

A. On some of them I was general superintend-

(Testimony of William Edward Joslin.)
ent; on others I was superintendent of construction, estimator, and manager of the mechanical department.

Q. Are you familiar with the type of work connected with the installation of Power House No. 1 at DeSoto, Kansas? A. Yes, sir.

Q. In connection with the Sunflower construction, Mr. [701] Joslin, as a whole, you had a contract for certain phases of the work. Will you explain what this included?

A. The entire mechanical work, involving the heating and plumbing; all of the proposed piping; the power house installation, exclusive of the boilers. That applies to Power House No. 1 and No. 3, and as an addition to our contract the completion of Power House No. 2.

Q. When did that work take you to the Sunflower Ordnance Plant?

A. In April, 1942, I was first called back for negotiation, and we actually started the operation in May, 1942.

Q. Mr. Joslin, were you given practically a twenty-four hour notice to get a crew started there?

A. Yes; that is correct.

Q. I think some statement was made that the contract was dated some time in September of 1942?

A. Well, I don't know about the statement being made, but I think that is the approximate date. I know it was later than the date we started.

Q. You were first working on a letter of intention? A. That is correct.

(Testimony of William Edward Joslin.)

Q. You were not bidding on specifications similar to these involved here,—similar to this contract?

A. We were to operate under specifications prepared by [702] the A.-E.-M.

Q. This was a Lump Sum contract?

A. Yes.

Q. Will you explain a lump sum contract and a cost plus a fixed fee contract, as you worked on?

A. Yes. On a cost plus a fixed fee there is an estimate of the amount of work in dollars and cents that is to be included in the construction work, or in the contract, and on which there is a fee allowed to cover that work. That is based on a curve, or a chart. The fee is graduated down according to the volume of work included in the contract. Our contract first started at a fee of 1.37 per cent.

Q. That was the estimated cost of your part of it?

A. Of our contract, and that was decreased as the various additions came in. It was decreased to approximately seven-tenths of one per cent,—an average of about one per cent overhead.

Q. And what does that include?

A. Our home office expense involved in the particular services which are to be included, and which are not reimbursible items. The only reimbursible items are the employees' time and the merchandise purchased for the contract. A lump sum contract is a contract on which the bidder bids on specifications as submitted to him. He analyzes the specifications and prepares [703] his estimate and submits

(Testimony of William Edward Joslin.)
a bid for a lump sum figure. That is the difference in the two contracts.

Q. During the war because of the constant changes a great many of the contracts with the general engineers,—the A.-E.-M. were operated on a cost plus a fixed fee basis rather than a lump sum?

A. Well, we had numerous cost plus a fixed fee contracts; yes.

Q. Now, Mr. Joslin, in addition to the items not reimbursible, were you required to finance the payments until the Government reimbursed you?

A. Yes, as a part of our overhead we were compelled to finance on most of the jobs all of the merchandise purchased, and on all of the jobs we were compelled to finance the labor involved on which,—after paying the labor payroll we would apply for our reimbursement. The financing of the job was a part of our overhead.

Q. That was a part of your overhead?

A. Yes, sir; it was.

Q. And that was included as a part of these expenses under this figure which I believe you gave as 1.37 per cent?

A. That is correct.

The Court: I think we will recess at this time until two o'clock. [704]

2:00 p.m.—March 27th, 1947

Q. (Mr. Gibson, continuing:) Now, Mr. Joslin, in connection with the reimbursible expenses that the Government paid you was there a limit which you could pay for engineers?

(Testimony of William Edward Joslin.)

A. Yes, sir; a definite limit.

Q. Will you explain that?

A. Yes. The maximum amount they would allow us to pay as reimbursible items for engineers was \$6,000.00. I had one, a man named J. W. McCarty, to whom I paid \$10,000.00 a year. He was a regular employee. I had to pay him \$4,000.00 in addition to the amount allowed as reimbursible, and I had another man that I paid \$9,000.00, of which I paid \$3,000.00 out of my own pocket. At one time, for a considerable period, the source of steamfitters and plumbers working overtime were making more money than the plumbing superintendent and the mechanical superintendent, and in order to equalize the sums I had to pay them an additional amount of money. You see I had them down at these certain salaries. The Government would not permit this. You see this had to come out of the fee in addition to the financing of the job.

Q. I believe you said part of your contract was mechanical? A. Yes.

Q. Will you please explain what that included?

A. Well, that was exclusive of some sheet metal work. It included all mechanical equipment, such as pumps, compressors; power houses, with the exception of No. 1 and No. 3, we did all of the pipe work in No. 3, all of the heating and plumbing. There were literally hundreds of miles of proposed piping of all of the distribution lines,—the piping within the buildings was a very extensive project:

(Testimony of William Edward Joslin.)

in fact, in one order we had seven hundred and fifty thousand feet of pipe.

Q. Various kinds of pipe ran all over the plant?

A. The distribution lines throughout the entire area covering several hundred miles.

Q. And those were used for different types of chemicals and water?

A. Yes, sir. In fact, there were nineteen different types of water alone, and then there were acids and various chemicals.

Q. Mr. Joslin, calling your attention to the sub-contract that is involved in this litigation, can you briefly state what transpired up to the time that the bids were submitted,—the calls for bids that were made in connection with this contract, the circumstances that led up to your subletting the contract?

A. My first knowledge of the fact that Power House No. 1 [706] was going to be placed in operation was a telephone call from the Project Manager, Frank Wedlick, who informed me the first part of June, 1944, that we had received notice to complete Power House No. 1. I told him at that time "The best thing you can do is to check up on the tube rolling equipment," which we had. I told that he would have to check up on this equipment and see that it would be available. About three or four days later he called me and said that they had decided to let the contract on a lump sum basis. I protested and asked Mr. Wedlick,—

Mr. Watts: (Interposing:) Just the conversa-

(Testimony of William Edward Joslin.)

tion between you and Mr. Wedlick,—just give us the conversation, your instructions to him, or whatever it was.

A. I instructed him on the telephone to go to the proper authority, which was Mr. Hagan, and tell him that it would be foolish to let that on a lump sum, that I was sure they would not get a figure less than one half million dollars, and I said, “We can do it, I believe, for \$375,000. I am positive we can do it for \$400,000.” Mr. Wedlick called me later and said that they insisted on letting it on a lump sum. My instruction was not to get involved in any contract that required him to specify, or that caused us to stick our neck out on what is there or what is not there, or anything about that contract.

Q. (Mr. Gibson, continuing:) After the contract proposals [707] or specifications were put out to the prospective bidders, to the Power Service Corporation, and after they had been accepted and were working on the job did the question come up with reference to the possible, or to the proposed modification of that contract by the Power Service Corporation? A. Will you state that again?

Q. Yes. After the contract and specifications were put out to the prospective bidders, and after the Power Service Corporation had been accepted and was working on the job, did the question come up with reference to a possible, or a proposed modification of your contract by the Power Service Corporation? A. Yes; there was.

(Testimony of William Edward Joslin.)

Q. Did that question continue on for that period of time up until about the first part of September, 1944? A. Up to about that time.

Q. And did you receive a communication from Mr. Wedlick the latter part of August in which he forwarded to you a copy of a letter from the Power Service Corporation dated August 22nd, which, I believe, is Exhibit No. 16, and ask for your instructions? A. Could I see that letter?

Q. Yes. And now, Mr. Joslin, will you see if you can identify that? I am showing you the original of the document [708] which was offered as Plaintiff's Exhibit No. 16. A. Yes, sir.

Q. Is that the letter sent to you by Mr. Wedlick in a letter of transmittal dated August 23rd?

A. Yes, sir.

Q. To which you replied? A. Yes, sir.

Q. When? A. August the 28th.

Mr. Gibson: I offer this letter in evidence as Defendant's Exhibit M.

(Whereupon the document referred to was marked Defendant's Exhibit M for purposes of identification.)

Mr. Gibson: The letter of August 23rd, 1944, from Mr. Wedlick is as follows:

"Mr. W. E. Joslin, Cory & Joslin, Incorporated
512 Golden Gate Avenue,
San Francisco, California.

"Dear Bill:

"Enclosed please find copy of Power Service Corporation's letter of August 22nd, 1944.

(Testimony of William Edward Joslin.)

"I am still of the opinion that we should not agree to this letter inasmuch as the Power Service Corporation's bid was based on the specifications.

"I would like your comments and criticism on the enclosed letter.

"Best regards

"F. V. WEDLICK."

To which under date of August 28th, 1944, the following reply was made:

"Cory, Joslin & Macnsons,
Sunflower Ordnance Works,

Post Office Box 36,
Kansas City, Missouri.

Attention: Mr. Frank Wedlick.

"Dear Frank:

"There is nothing we can do contrary to specifications, and as a result I am loath to put anything in writing that would in any way conflict with the specifications. Certainly, I am not privileged to say that disbursement would be made for increased costs. Consideration for extension of time due to non-delivery of essential materials would at all times be in order.

"I am not familiar with the legal phases involved but I am sure we must insist that the terms of the contract be met, and that any consideration for additional costs and extension of time must be submitted direct to others than ourselves for approval.

(Testimony of William Edward Joslin.)

This, of course, will [710] be separate and not a part of the contract which must be signed as is.

“Very truly yours,

W. E. JOSLIN.”

Q. (Mr. Gibson, continuing:) Are those the last instructions given by you to your Project Manager, Frank Wedlick, before the contract with the additional clause on it was signed and approved?

A. So far as I can remember.

The Court: If this has been offered and there is no objection, it may be admitted.

Mr. Watts: We have no objection.

The Court: Then it may be admitted in evidence.

(Whereupon Defendant's Exhibit M. so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) Mr. Joslin, you know that a claim was filed which was finally referred to the Chief of Engineers by the Power Service Corporation in connection with alleged damages in the amount of ten thousand and eight dollars and thirty cents?

A. Yes; that is right.

Mr. Gibson: I am now offering Exhibit N, and

Q. (Mr. Gibson, continuing:) I will ask you if you can identify that. It is three or four documents that are tacked [712] together.

(Testimony of William Edward Joslin.)

Mr. Watts: We have no objection to their introduction.

(Whereupon documents referred to were marked Defendant's Exhibit N for purposes of identification.)

The Court: It may be admitted.

(Whereupon Defendant's Exhibit N, so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) You can identify them, Mr. Joslin? A. Yes.

Q. What are they?

A. This is a letter from the Chief Engineer, or, rather, a copy of a letter from the Chief of Engineers, Lieutenant General R. A. Wheeler. It is addressed to the Power Service Corporation, Wesley Temple Building, Minneapolis, Minnesota, and is dated the 12th of March, 1946.

Q. That is the letter which rejected the claim of the Power Service Corporation?

A. That is right.

Q. And attached to that letter is another letter. Will you identify that, if you please?

A. That is addressed to W. E. Joslin, Owner, Cory, Joslin & Macnsons, San Francisco, California, and is dated the 26th of [712] March, 1946, and that is signed by I. M. Hember, Chief, Contracts and Claims Branch.

(Testimony of William Edward Joslin.)

Mr. Gibson: That letter which was just identified by Mr. Joslin is as follows:

“Dear sir:

“Enclosed for your record is a copy of the decision of the Chief of Engineers made in connection with the appeal of Power Service Corporation under its sub-subcontract No. 5 with your firm at Sunflower Ordnance Works.

For the District Engineer,

Sincerely yours,

L. M. HEMBER,

Chief, Contracts and Claims Branch.”

And on the reverse side of the letter there is a blue stamp marked showing that this was sent on March 26th, 1946, from the United States Engineers Office, Kansas City, Missouri. That is according to the stamp on the reverse side of the letter.

Q. (Mr. Gibson, continuing:) Mr. Joslin, did that notice of decision of the Chief of Engineers arrive in your office, or did you receive it until sometime after the 26th of March?

A. It was after the 26th of March, 1946.

Q. Did you receive any notice of any other decision? A. Yes. [713]

Q. About the nineteenth of March, 1946, did you mail to the Power Service Corporation a final check of the balance due them in the amount of \$1,000.00, which was subject to that letter?

(Testimony of William Edward Joslin.)

A. I did.

Q. And with that check was a letter of transmittal outlining and containing a series of receipts to be signed by the Power Service Corporation?

A. I think there was approximately five copies on which I requested signature. That was on our stationery and read as follows: "Payment in full, exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision." They signed my five copies and later included some copies on their own stationery with the same language that I incorporated on my stationery. All of this correspondence was later supplemented by additional correspondence. There was also a letter stating that this had been signed, not by the treasurer, but by the secretary of the organization, and asked if we would not include Mr. Gaffney's receipt in lieu of the previous one—

Q. (Interposing:) You have all these letters in your file?

Mr. Watts: I do not question that at all. [714]

Mr. Gibson: Very well.

Q. (Mr. Gibson, continuing:) Now, Mr. Joslin, attached to the letter which you read as Exhibit M, will you tell us what the pink slip is?

A. That is the copy of the check to the Power Service Corporation. We send the check with duplicate markings. We have two copies; one we file numerically and the other alphabetically.

Q. It is the form you use as a voucher—a form of check?

A. Yes, sir; it is.

(Testimony of William Edward Joslin.)

Q. The original goes to the payee?

A. Yes, sir.

Q. With a copy of the voucher attached?

A. Yes, sir; that is detached before cashing.

Q. You have the original check here?

A. Yes, sir.

Q. Showing that it was cleared through the bank and cashed? A. That is right.

Q. Now, at the time this letter was sent and the check was sent, you didn't know at that time that the Chief of Engineers had decided the appeal of the Power Service Corporation? [715]

A. I didn't know anything about it.

Q. The claim you referred to is the same claim that was filed with the Chief of Engineers, and is the subject matter of this litigation here today?

A. Yes, sir; that is the same thing.

Q. Except the difference in the amounts. This is for some thirty odd thousand dollars.

A. I am speaking of this claim that is attached here (indicating).

Q. After the contract with the appended clause had been executed by the Power Service Corporation and signed by your manager, Mr. Wedlick—

A. (Interposing:) Yes, sir.

Q. (Continuing:) I had not finished my question. A. Pardon me, Mr. Gibson.

Q. After the contract with this clause appended had been executed and signed, did you have a discussion with reference to the effect of the additional clause that was placed at the bottom of the signature page in that form contract?

(Testimony of William Edward Joslin.)

A. At a later date, you mean?

Q. Yes.

A. Yes, sir; I did.

Q. Was the circular emanating from Mr. C. H. Murphy, and which had the note attached by Mr. Dergance sent through [716] your office?

A. Yes, sir.

Q. And that was covering that clause?

A. Yes, sir.

Q. That is the document you have in your hand?

A. Yes, sir.

Q. And that is the one we are referring to now?

A. Yes, sir.

Mr. Gibson: I offer this in evidence.

(Whereupon document referred to was marked Defendant's Exhibit "O" for purposes of identification.)

Mr. Watts: I have no objection.

The Court: It may be admitted, and I think that will be Defendant's Exhibit "O".

(Whereupon Defendant's Exhibit "O" so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) Now, Mr. Joslin, I call your attention to what has been marked as Defendant's Exhibit O, and I will ask you if that is the document that you have reference to?

A. This is the same one; yes, sir.

Mr. Gibson: Exhibit I is as follows, and is dated September 5th, 1944. It is from C. Howard Mur-

(Testimony of William Edward Joslin.)

phy, subcontract manager, to P. A. Dergance, attorney: [717]

“Subject: Contract No. 5 to F.F. Subcontract No. 5, Power Service Corporation.

“Attached hereto for your review is a copy of the above described subcontract which has been signed by the subconstructor with the following qualification imposed on the signature sheet.

“‘This contract is signed and executed by the Power Service Corporation without any intent on the part of the Corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials notwithstanding the provision of Paragraph 1-05 of the Specifications.’

“The reference, Paragraph 1-05, was a part of the Specifications on which bids were taken, and has not been changed in any respect in the writing of the formal contract. As to this date this department has no information to the effect that actual damages have occurred, however, there exists items of correspondence from the subconstructor pointing out anticipated damages which could not now be computed even if they were determined to be payable under the terms of the subcontract.

“It is, therefore, our opinion that qualifications [718] which might alter the terms of the subcontract as it was originally written should not be written into the subcontract.

“Your opinion is requested with regard to whether or not the terms of the subcontract have

(Testimony of William Edward Joslin.)

been modified by the qualification, and with regard to the advisability of Cory, Joslin & Macnsons entering into, and the A-E-M approving the sub-contract in consideration of the existing qualification.

/s/ C. HOWARD MURPHY,
Subcontract Manager."

And there is appended to that the following:

"In my opinion the subject clause does not change the terms of the contract. It merely reiterates the right, if any, of the Corporation to submit a claim growing out of the situation with respect to materials."

And that is initialed "P. D." and dated 9-16-44, and there is in typing "Phillip Dergance."

Q. (Mr. Gibson, continuing:) Mr. Joslin, did you at the time this contract was entered into have any understanding with the **Power Service Corporation** that the specifications were to be interpreted in any light other than the wording of the specifications? A. I never did. [719]

Q. Did you at any time—at the time this contract was entered into or negotiated did you authorize your agent to sign any contract on behalf of you that would in any way alter the terms of the specifications? A. I did not.

Q. Now, back to the Power House, I understood that you had completed during the course of your work at Sunflower one of the power houses?

A. That is correct.

(Testimony of William Edward Joslin.)

Q. Which one was that?

A. That was Power House No. 2, and in addition to that we completed—

Q. (Interposing:) Just a moment, Mr. Joslin. Then I understand that nine months, or a year, prior to the date of the contract with the Power Service Corporation there was a directive order to cease operation on Power House No. 1—let me ask this: Had work started on Power House No. 1 prior to the cease-work order? A. Yes, sir.

Q. And were there other buildings placed in stand-by condition?

A. Yes, sir; a lot of them.

Q. What happens to the materials when these buildings are directed to be placed in stand-by condition? [720]

A. The material that has not been used, or put into the structure, when a building is placed in stand-by condition—and there were a number so placed—when we receive notice to place a building in stand-by condition we would go to the site and gather, or collect, all of the surplus materials and return them to our warehouse and use them on future construction.

Q. What do you mean—what warehouse do you mean?

A. I am referring to our materials when they were returned to our warehouse—**materials of other** contractors, they collected.

Q. And that would apply to what materials?

(Testimony of William Edward Joslin.)

Would it apply to all electrical material and such as that?

A. All of the A-E-M contracts, and the Hercules operators, all of their equipment would be gathered up.

Q. Was it the custom to make a list of the materials stored when a building was placed in stand-by condition?

A. No; we didn't make a list because when a building was placed in stand-by condition we assumed that it was permanently in stand-by condition.

Q. Well, let me ask this: What would be the recognized procedure after an order was received to complete a building which had previously been placed in stand-by condition?

A. Well, some buildings were placed in operation after [721] they were placed in stand-by condition, and at that time our engineers would go to the site and check off the materials and equipment installed up to the time it was placed in stand-by condition. After they checked them off they would take the plans and make a complete takeoff, eliminating that part which was installed and issue requisition to our warehouse for the balance of the material to complete that building.

Q. The statement was made here, Mr. Joslin, that the material which was not available at the Power House No. 1 itself was not available adjacent thereto. Now, can you state where your storehouse was in comparison to Power House No. 1?

(Testimony of William Edward Joslin.)

A. Yes. I heard that statement that the materials were stored five miles away. I want to say that I know of no warehouse that is five miles removed from Power House No. 1. The Hercules warehouse was on the main street facing Power House No. 2. I would say that was possibly three blocks, and that would be the first warehouse from Power House No. 2.

Q. In which some of the material might be stored?

A. A lot of it was stored in that, and Power House No. 1 was approximately three-eighths of a mile from Power House No. 2. Power House No. 1 was over here in this [722] location (indicating); Power House No. 2 was here (indicating) and Power House No. 3 over there (indicating), about three-eighths of a mile between each. To the best of my knowledge, I don't know any warehouse that would be in excess of a mile from Power House No. 1.

Q. Now, particularly in reference to the storehouse which you referred to as yours, what distance would that be from Power House No. 1?

A. Our warehouse at the time Power House No. 1 went into stand-by condition, I would say was a half mile from Power House No. 1. Later the A-E-M took over our warehouse and our shop was moved back into the area about two miles—about two and a half miles from Power House No. 1, but our warehouse was taken over by the A-E-M and remained in the same location.

(Testimony of William Edward Joslin.)

Q. Now, these materials that were referred to as being in adjacent buildings—you are familiar with the contract are you, Mr. Joslin?

A. Yes.

Q. This was referred to as being adjacent, and in fact, in the storehouse. Now that material was of a minor nature?

A. They were large warehouses.

Q. But the items of materials stored there as distinguished from the materials stored in Power House No. 1, what was the [723] nature of that?

A. Well, there was a block of equipment, such as boilers, fans, pulverizing equipment, steam generating equipment—was all practically in Power House No. 1. The valves, fittings and so on was in the warehouse, and the pipe was fabricated in Philadelphia and some of it was in the power house and some adjacent to it on the outside.

Q. Was there adjoining the power house a shed where some material was stored?

A. There may have been a temporary shed built there. I know some material was stored outside.

Q. Now, Mr. Joslin, you have explained the normal procedure when a building was taken out of stand-by as to some of the procedure followed. Let me ask you this: Would this material list, or inventory list—whatever it might be called—enable you to ascertain the shortage and to secure the necessary material to complete the building?

A. As soon as we made a material take-off or inventory of the materials not installed these requi-

(Testimony of William Edward Joslin.)

sitions would then be forwarded to our storehouse, or warehouse, and the material we could not supply would go to the Hercules people and if they didn't have it available we would purchase it outright.

Q. Now, assume that the list or inventory was made of any material which had not been used in the construction of the building when the stand-by order was issued, would that obviate the necessity of a physical inventory when the building was ordered back into construction?

A. No, sir; because that material was very frequently used elsewhere.

Q. Then even a short interval between the inventory and the time of the order putting it back into construction would not be a true inventory of the material which existed a few days later than the inventory?

A. Will you repeat that question?

Q. Even with only a short interval the inventory existing at the time of the stand-by order would not necessarily be a true inventory of the material existing a few days later?

A. No, sir, because it might be used if the necessity arose.

Q. And the reason inventories were not taken was because those supplies were taken up to general supply depots?

A. Yes, sir; that is right.

Q. And they were then co-mingled with other material of the same kind?

(Testimony of William Edward Joslin.)

A. That is right, and it might be requisitioned out the next day. [725]

Q. And if they were valves they would be put in with valves of the same type when they were taken up there?

A. That is right, they were: yes, sir.

Q. At the time the specifications were sent out, and at the time the bid was accepted of the Power Service Corporation, did you have any knowledge as to what materials were, or were not, available for the completion of Power House No. 1?

A. No; I had no information as to what was, or was not, there.

Q. You had no such information?

A. No, sir.

Q. Did you have any knowledge as to the absence of materials?

A. I had no knowledge of the absence or presence of materials.

Q. Were you under any requirement before the contract was let to the Power Service Corporation to inventory any part of the materials in Power House No. 1?

A. I was not only not under any requirements, but I would not have been permitted to do so by the officers in charge there.

Q. It was not a part of your contract to do that kind of work?

A. We were permitted to do only that work specified in [726] our contract, and inventorying the materials was not a part of our work.

(Testimony of William Edward Joslin.)

Q. At the time this contract was entered into did you have any basis for any knowledge, or did you have any knowledge, or did you expect the absence of materials to complete Power House No. 1, or did you have any knowledge of the presence of the materials at the site, in the Power House, or in storage? A. No.

Q. Let me put it this way: Did you have any knowledge which led you to believe that there was a shortage of materials?

A. I was positive there would be a shortage of materials, the fact that we were constantly borrowing from building to building throughout the area—any building that was in stand-by condition for about a year, there was an absolute certainty to be a shortage of material in that building.

Q. Do you know of any recognized method by which the amount of material necessary to complete Power House No. 1 could have been ascertained except by taking a physical inventory of what was then present in the building, and in adjacent buildings?

A. After Power House No. 1 was ordered into construction?

Q. Yes; after it was ordered into construction.

A. The only recognized method I would know would be this: You see work had been started in Power House No. 1 prior to the orders being issued to put it in stand-by condition, and the only way you could ascertain what was to be done, or what materials were to be supplied, would be to secure

(Testimony of William Edward Joslin.)

a set of plans and check that plan against the equipment and materials installed in Power House No. 1. Deduct that from the quantities as shown on the plans, that is, the material and the equipment as shown on the plans and make an inventory of the entire materials and equipment required and deduct that from the materials you secured in the plans, and the materials that had been installed.

Q. You say you take the entire amount of materials and equipment required and deduct that from the materials shown in the plans?

A. Yes. Perhaps my answer was not quite clear, but what I meant to say was that after you get a set of the plans you check that against the materials that are already installed in the power house. You deduct the materials installed from the materials and equipment shown on the plans, and also deduct the materials that are on hand from the materials shown on the plans. This would give you the materials missing.

Q. Was that what was in substance required under the contract with the plaintiff the Power Service Corporation? [728]

A. It was the plaintiff's responsibility to make the physical inventory—that was their responsibility.

Q. During the course of the contract, that is, the Power Service Corporation contract, requests for an addition, or a paragraph, modifying the terms of the contract by providing for a situation where damage could be claimed by the Power Serv-

(Testimony of William Edward Joslin.)
ice Corporation, and by the terms of the modification?

A. Yes; I think it was about August 8th.

Q. Yes, perhaps that is right. I am calling your attention now to Exhibit No. 9, and I will ask you if this matter of the addition of this clause was taken up with you at any time—I think Exhibit No. 9 is the first proposal for a change?

A. Yes; I remember receiving this.

Q. What exhibit are you talking about now, Mr. Joslin? A. This is Exhibit No. 9.

Q. That is right, Exhibit No. 9 dated August 8th, 1944, and is addressed to your company, and is as follows:

“Gentlemen:

“Referring to No. 1 boiler plant at Sunflower Ordnance Works on which we bid July 8th, 1944, we request permission to append the following proviso on the signature sheet of the formal contracts presented to us to sign.

““Water-wall and roof boiler tubes which were to have been furnished by the constructor and available [729] to the subconstructor immediately he was directed to proceed were not, and are not, as of date of contract so available. This contract is above executed by the subconstructor reserving full rights of recourse to claims for extension of time and for reimbursement of such increased costs as may be occasioned by non-availability of these above mentioned materials which were represented in bidding

(Testimony of William Edward Joslin.)

information to be at the site as of date of direction to proceed.' "

It is shown in the evidence that your agents refused that clause?

A. In the way it is worded, yes, sir.

Q. This proposed to insert the clause which says that this contract is executed by the subcontractor reserving full rights of recourse to claims for extension of time and for reimbursement of such increased costs as may be occasioned by non-availability of these above mentioned materials which were represented in bidding information to be at the site as of date of direction to proceed. Now, Mr. Joslin, was there any information authorized by you to any person in making a bid, or at any other time which in any way varied the terms of the proposals themselves? A. There was not.

Q. Under the contract the contractor was required to maintain as close as possible a proposed production or progress [730] schedule and the time for completion in the original contract was November 10th, 1944?

A. In the original contract, yes.

Q. And it also provided that an extension of time in proportion to the amount of any increased work, or increase to that contract, would be allowed to the subcontractor for completion?

A. Yes, sir.

Q. Did the Power Service Corporation ever ask for extra time on that?

A. I believe they did, and I might state in reply,

(Testimony of William Edward Joslin.)

that is, in my letters in the previous correspondence in which I objected to certain matters as written I did not object to the extension of time phrase. I think they did ask for an extension of time at a later date.

Q. That was your reply to letter which is Exhibit 9—you objected to that clause?

A. Yes, sir.

Q. But the matter of extension of time was covered by the contract?

A. Yes, sir; and they asked for an extension of time. I believe they did that later.

Q. And then later on they refused to accept the extension of time when it was granted?

A. That is right. [731]

Q. Under that computation of time under the contract, do you know the over-all addition that was given to the Power Service Corporation?

A. Yes, sir; approximately \$18,000.00, I believe.

Q. And would that extend the contract?

A. That automatically extends the contract for five days. That is my interpretation of it.

The Court: I believe we will recess for fifteen minutes at this time.

March 27th, 1947, 3:15 p.m.

Q. (Mr. Gibson, continuing): And that extension is something that you couldn't take away from the plaintiff if you wanted to?

A. No, sir; it was their automatic right.

Q. So that the real time for the completion of the contract, according to the plans and specifications would have been November 15th?

(Testimony of William Edward Joslin.)

A. That is my interpretation.

Q. And in addition to the \$466,000.00 that was paid the plaintiff was there additional work to complete the power house?

A. Yes, sir; we were allowed approximately \$40,000.00 for work which we were to do in completing the contract, work not [732] included in the Power Service Corporation contract, but yet a part of the completion of Power House No. 1.

Q. That \$40,000.00 was on the actual cost?

A. That was added to our existing contract as a modification.

Q. And that covered all the cost of that work?

A. Yes, sir; on which we secured our regular fee in the neighborhood of 1.7 per cent.

Q. And the total cost of the completed power house No. 1 was a few dollars over \$500,000.00, which you said it would cost?

A. I made an estimate that they would not receive a bid less than one half million. That was my estimate of the cost,—was \$400,000.00, but I said they would not receive a bid of less.

Q. Your estimate was that they would not get a bid of less than \$500,000.00? A. Yes, sir.

Q. **And that was for the completed job?**

A. Yes, sir.

Q. You have read the clause added to the signature page of the contract and initialed by your man after your letter to him. Now, what interpretation do you place on that with reference to the main contract? [733]

(Testimony of William Edward Joslin.)

A. My interpretation is that it did not change the contract in any manner whatever.

Q. Upon what do you base that?

A. I base that on the fact that I gave instructions to Mr. Hagan on or about August 14th, 1944.

Q. That was,—strike that, please. During that period there was a discussion as to some proposal by the Power Service Corporation and the clause in their letter of August 8th?

A. That is right.

Q. You say you gave Mr. Hagan instructions?

A. Mr. Hagan was presiding at a conference in his office, and I attended, or invaded, that conference, and I informed him that I would not be a party to any clause that would change the terms of that contract in any way, shape or form, and I so instructed my Project Manager, Mr. Wedlick. That was about August 13th, 1944, and when this was signed I was positive that it did not change the language of the contract one bit, and during my visit to the Sunflower Works I confirmed this with Mr. Dergance, myself.

Q. What is your own interpretation of that clause? I believe you based your last answer in part as to information or confirmation of your opinion by Mr. Dergance. Now, I will ask you, Mr. Joslin, what is your own interpretation of the clause? [734]

A. My own interpretation is that the clause does not change the contract in any shape or form.

Q. And have you explained as to how you arrived at that interpretation,—what you base it on?

(Testimony of William Edward Joslin.)

A. I base it on this fact: That at no time did we ever attempt to deprive the Power Service Corporation of the rights under their contract, and to me this only reiterates the rights that existed at the time the contract was first submitted to them, and I further base it on the fact that if consideration is given to this clause then there is no completion date on the job, because if no consideration is given to paragraph 1-05 of the contract, it eliminates the completion date, and if consideration is given to paragraph 1-05 then the completion date is November 15th. The contract remains as is. But if consideration is given to this clause as added there is no completion date, and I don't think the Government would accept such a contract.

Q. Why do you say there is no completion date?

A. Well, there isn't a date for anything.

Q. Why do you say that?

A. If you eliminate paragraph 1-05 you eliminate the number of days in which this contract was to be completed, or, rather, when the project was to be completed.

Q. That is the only clause that provided a completion date? [734]

A. That paragraph contains the only clause as to any number of days in which the project must be completed.

Q. Then how do you arrive at the interpretation which you say you have arrived at?

A. Well, in this way: If consideration is given to this clause, of course, consideration can only be given to the fact that it eliminates paragraph 1-05,

(Testimony of William Edward Joslin.)

and if it eliminates 1-05 there is no completion date, and you have no delivery date of materials, and I know the Government would not approve that, and neither would I, and the fact the Government approved that is the basis for my interpretation.

Q. There must be a completion date?

A. Yes, sir; there must be.

Q. And paragraph 1-05 is the only clause, or contains the only clause that provides for a completion date?

A. It is the only paragraph that provides the time in which it must be completed.

Q. And the clause which mentions the delay in the delivery of materials, that would be based on the clause that this clause which is added to the contract is objecting to?

A. That is my interpretation.

Q. Some time before this contract was approved did you have occasion to meet Mr. Fegles, the President of the Power Service Corporation?

A. I did. [735]

Q. Did you meet him at the Gopher Ordnance Works?

A. At the Twin City Ordnance Works. I was called over by Colonel Taylor to bid on the completion of the Gopher Ordnance Plant. He was at that time the Area Engineer at Gopher and Twin Cities Ordnance Plants, and before going to the Gopher Plant, Colonel Taylor took me and introduced me to Mr. Fegles. I think it was at lunch. Colonel Taylor said, "I want you to meet your contractor,

(Testimony of William Edward Joslin.)

the one who has the subcontract at Sunflower," and Mr. Fegles said, "I would like to amend the contract there," and I said, "I am sorry, but that is not within my authority. So far as I am concerned, the contract will have to be left as written." That took place at the Twin City Ordnance Plant.

Q. That was before this clause was added?

A. Yes, before the clause was added to the contract.

Q. Mr. Joslin, have you prepared a diagram, or a schedule, to explain as you view it the construction, or the progress schedule, that has been submitted in this matter by the plaintiff?

A. Yes, sir; I have an enlargement of their progress schedule.

Q. From the schedule as it is enlarged by your copy, can you show the time at which certain items should have been completed, after the receipt of materials that have been [736] claimed here were short?

A. After they were delivered, you mean?

Q. Yes; after they were delivered.

A. Yes, sir; I can.

Q. First, would you explain what lower document is?

A. That is the progress schedule which has been submitted by the plaintiff.

The Court: The record may show they are now talking about Exhibit No. 62.

Mr. Watts: That is correct.

Mr. Gibson: Yes, this is Exhibit 62.

(Testimony of William Edward Joslin.)

Q. I hand you Exhibit 62, and I will ask you if you will compare that with the copy of the one from which you made your enlargement.

A. Yes, sir; and I will say that is a duplicate **copy**.

Q. Then from Exhibit No. 62 have you made an enlargement on some of the segments of this work?

A. Yes.

Q. Will you explain what the enlarged chart is?

The Court: You may mark this as Defendant's Exhibit "P". I believe that is the next letter.

Mr. Gibson: Pardon me, your Honor. I should have had that marked.

(Whereupon document referred to was marked Defendant's Exhibit "P", for purposes of identification.) [737]

Q. (Mr. Gibson, continuing): Now, go ahead, Mr. Joslin.

A. This one happens to be a break-down of the drums, tubes, water-all headers and tubes.

Q. And your Exhibit P is a break-down of this schedule?

A. This is a break-down of the Power Service Corporation's schedule dealing with the drums, tubes, water-wall headers and tubes between these dates, July 19th and August 23rd. This indicates July 19th, right here (indicating), and this indicates August 23rd right here (indicating); in other words, that represents thirty-six days to accomplish the setting of the drums, tubes and water-wall headers.

(Testimony of William Edward Joslin.)

Q. For what particular boiler is that?

A. Boiler No. 1. There is thirty-six days to complete this, which makes 2.78 per cent of completion per calendar day. That is the proposed schedule. They started on this date indicated by the black line. The black represents the actual operation. This broken line represents their proposed schedule, and the black line their starting date, and this is the actual operation through here (indicating). They started, as you can see, on July 19th.

Q. On what segment of the work was that?

A. On the boiler drum, tubes and headers. That is in here (indicating). They started on July 19th, the day they proposed to start, and on August 19th they issued their first [738] requisition.

Q. For what was that requisition?

A. For tubes. It is shown here on this enlargement (indicating). On August 3rd the Power Service Corporation advised that the tubes were required on August 1st. This was on August 3rd that they stated that the tubes would be required on August 1st. On August 26th was the first notice of any tube shortage, and the first requisition was issued to us on August 19th,—pardon me, I think I said August 26th was the first notice of tube shortage; I should have said July 26th, instead of August 26th. This boiler was started on July 19th and completed on September 8th. I might explain here that in accordance with our interpretation. Mr. Borst was asked for the completion date of the boiler tubes, drums and headers, and I think he said

(Testimony of William Edward Joslin.)

December 1st. We take it it was on September 8th that he reported the drums, tubes and headers as 99.9 per cent complete, and they ceased all operations from that time on. I don't know how late it was, but I think that this is to November 24th, and there was no further operation on that boiler after September 8th.

Q. Did Mr. Borst state yesterday that it was completed on December 1st?

A. Which would mean that they completed one-tenth of [739] one per cent, or an amount equal to \$32.80, and that required eighty-three days to complete \$32.00 worth of work, but we assumed this is the date they completed, the day they stopped all of the work.

Q. And what date was that, Mr. Joslin?

A. September 8th. Down here (indicating) in accordance with their schedule, they had the drums and tubes for Boiler No. 1,—they were available on the site for Boiler No. 1, and they should have completed this on August 31st, because on August 17th the water-wall tubes were delivered.

Q. Now, this is boiler No. 1?

A. Yes. On boiler No. 1 the tubes were delivered on August 17th, and on August 25th it shows on the schedule that they were 84.5 per cent complete, and just applying their own percentage rate of completion per week, it would then have been completed on August the 31st.

Q. Were the materials there?

A. Yes; they were all there in order that it

(Testimony of William Edward Joslin.)

could have been completed on August 31st, if they had maintained their schedule.

Q. And, actually, they completed on September 8th with boiler No. 1? A. Yes.

Q. Now, you may go ahead with your explanation, Mr. Joslin. [740]

A. On boiler No. 2 they proposed forty-two calendar days, that is, between the dates of July 20th and August 30th, forty-two days, or an average of 2.38 per cent completion per calendar day, but ninety days were required to complete this boiler. They started on July 25th.

Q. Their estimated time was how much?

A. Forty-two days.

Q. And they used how much?

A. Ninety days, an average of 1.11 per cent completion per calendar day. If the Power Service Corporation had maintained their own schedule as shown there, with the water-wall tubes delivered on August 20th, and I might say here, the Power Service Corporation notified us that there was an error in the water-wall header on September 27th, and the error in the tubes was corrected on October 18th, at which time their schedule,—this schedule here (indicating),—on October 18th their schedule shows them to be 97.8 per cent completed, if they had maintained their schedule; so on October 18th they would have required two days following their own schedule to have been one hundred per cent complete; in other words, they should have com-

(Testimony of William Edward Joslin.)

pleted on October 20th, when actually they did complete on October 27th.

Q. You said that the water-wall tubes were delivered on September 20th? [741]

A. No; they were delivered on August 20th. The Power Service Corporation notified of the error in the water-wall header on September 27th, and that error was corrected on October 18th, and they should have been ninety-seven and eight-tenths per cent completed, in accordance with their schedule, and it would have required only two days to finish. Actually, they completed October 27th, which was seven days behind on boiler No. 2. On boiler No. 3 they show forty-five calendar days to complete, between July 25th and September 6th, an average of 2.22 per cent completion for each calendar day. The actual record is that there was seventy-one days and an average of 1.41 per cent completion per calendar day. The water-wall tubes were delivered on September 20th. The headers were delivered September 26th, on which dates, or, rather, on the 26th their schedule shows 58 per cent completion, and following their schedule of an average of 2.22 per cent completion per calendar day, they should have been,—

Q. (Interposing): That was their estimate?

A. Their proposed construction schedule. They proposed to accomplish that from July 25th to September 6th, and on September 26th, which was the date the water-wall tubes and headers had been delivered,—following their own construction schedule

(Testimony of William Edward Joslin.)

they would have been completed on October 14th. They actually completed October 20th, which was also six days late. [742] Mr. Borst stated that he completed the boiler construction, that is the drums, headers and tubes on December 19th, not on October 20th, but on October 20th they ceased all operation on boiler No. 3 when they were 99.7 per cent complete, and it is hardly conceivable that they could only accomplish three-tenths of one per cent of this work from October 20th until December 19th. We maintain, and I think this will prove, that had they maintained their schedule boiler No. 1 would have been completed on October 31st; boiler No. 2,—that is, the drums, tubes and headers, would have been all completed on October 20th; boiler No. 3 would have been all completed on October 14th.

Mr. Gibson: I wonder if the record shows this is admitted?

The Court: Yes; the record shows that your Exhibit P is admitted.

(Whereupon Defendant's Exhibit P, so marked for identification, was admitted in evidence.)

Mr. Gibson: Very well. Now, I will proceed with this.

Q. (Mr. Gibson, continuing): Now, let's identify this document. What does that purport to be?

A. Well, this is Item No. 2 on boiler No. 1 of segment No. 3; that is Item No. 3, the pulverizers, exhaust, burners, and soot blowers. They are listed, as I said, or attempted to [743] say, as Item No. 2 of Segment No. 3 on boiler No. 1, that is, it refers to boiler No. 1.

(Testimony of William Edward Joslin.)

The Court: You are now indicating, Mr. Joslin, to Plaintiff's Exhibit No. 62?

A. Yes, to Item No. 3.

Q. (Mr. Gibson, continuing): And this refers to Item No. 3 on segment No. 4 under boiler No. 2?

A. Yes, sir; and this (indicating) is Item No. 4, segment 5 of boiler 3.

Mr. Gibson: This is now referring to Exhibit 62, and I will offer as our exhibit this document, which will be Exhibit Q.

(Whereupon document referred to was marked Defendant's Exhibit "Q" for purposes of identification.)

Mr. Watts: We have no objection.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit "Q," for identification, was admitted in evidence.)

A. Now, on this we are not taking the dates as to the installation or completion of the work regarding the tubes and headers. There is a certain sequence of operation. You have the erection of the steel, and you have the drums. You of course cannot set the drums unless the steel is in place, and **you can't put the tubes in unless the drums are in place**, [744] and you have the furnace and the boiler tubes and the water-wall tubes, and after that you have the hydrostatic tests, that is, plugging up of the openings and filling with water, and testing for leaks. In this project the only claim we have here is an alleged shortage of boiler tubes and headers. We are basing everything upon the com-

(Testimony of William Edward Joslin.)

pletion of the boilers, the tubes and the headers from that date, and we are taking the dates that they actually completed their work on the boiler tubes and headers on boiler No. 1, which was September 8th. After that completion they showed that they would require eighteen days to complete the pulverizers, exhaust, burners, and soot blowers,—that is on boiler No. 1.

Q. And that is their schedule?

A. Yes. Which would make their completion date September 26th on boiler No. 1.

Q. How do you arrive at the eighteen days?

A. Well, they show the completion of the drums, tubes and headers here (indicating), and they show that they require eighteen days after the drums, headers and tubes are completed. They show on their own schedule here (indicating) that they will require eighteen days to complete it, which will bring that date to September 26th, on which they would have had this work completed, had they maintained their schedule, but they were actually completed on October 27th. On boiler No. 2 they [745] required eleven days to complete this work after the,—

Q. (Interposing): Just a moment, Mr. Joslin. How do you arrive at that time, the eleven day period?

A. According to their own schedule, they require eleven days to complete.

Q. And that is shown by their exhibit?

A. Yes, sir. This proposed schedule shows that

(Testimony of William Edward Joslin.)

they proposed to complete this work in eleven days, so that would leave eleven days from October 27th, and according to that they would have completed the pulverizers, exhaust, burners and soot blowers on November 7th. On boiler No. 3 the schedule calls for eleven days for the completion of the pulverizers, exhausts, burners and blowers after the drums, tubes and headers were in place, and they were in place on October 20th, and following their own schedule that would have been completed on October 31st.

Q. With reference to these items, there was a question of absence of materials, was there?

A. No question of absence of materials on this.

Q. The only thing was that certain work had to be done before they could complete this?

A. Nothing should have held this work up, except the lack of manpower. We are assuming, of course, that the plaintiff contends that because the boilers, drums, tubes [746] and headers were not completed that they were delayed, so we are taking the completion date of the boilers, drums, tubes, and headers, and going from that point to show that it could be completed on the dates that I have shown here, assuming that they did interfere with this work. Now, I will go to the next item.

Q. That document purports to be what?

A. That has to do with the induced and forced draft fans and drives.

Q. That has been marked Exhibit R?

A. Yes, sir.

(Testimony of William Edward Joslin.)

(Whereupon document referred to was marked Defendant's Exhibit R, for purposes of identification.)

Mr. Gibson: We offer now Exhibit R,—Defendant's Exhibit R.

Mr. Watts: No objection.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit R, so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing): You said that has to do with induced and forced draft fans? And drives? A. Yes.

Mr. Gibson: This is Item No. 7 of segment 3 on boiler No. 1. [747]

Q. (Mr. Gibson, continuing): Was that statement correct that I just made, Mr. Joslin?

A. Yes; it was.

Q. Speaking from plaintiff's Exhibit No. 62, as I mentioned, it is Item No. 7 of segment No. 3 in regard to boiler No. 1, and it is Item No. 9 of segment No. 4 under boiler No. 2, and it is Item No. 10 under segment No. 5 of boiler No. 3, induced and forced draft fans and drives? A. Yes, sir.

Q. And Exhibit R is an enlargement from Exhibit No. 62 as to the items that I have mentioned in regard to the work on those items?

A. Yes, sir; on that part of the work the Power Service Corporation proposed to complete this job in seventeen days after August 31st, or on Septem-

(Testimony of William Edward Joslin.)

ber 17th, a total of seventeen days, an average completion of 5.88 per cent per calendar day. That is from their own statement, and the boiler was completed on September 8th.

Q. That is, it was 99.7 per cent complete?

A. Yes; and maintaining their schedule they would have been completed on September 10th.

Q. You say, Mr. Joslin, maintaining their own schedule, you mean, maintaining their own schedule they would have completed what? [748]

A. The induced and forced draft fans on boiler No. 1 on September 10th.

Q. How do you arrive at **that date?**

A. Their schedule shows that continuing on from the date the drums, tubes and water-wall headers were completed that with this work we are considering now they were ninety per cent complete on September 8th. You can follow this line (indicating) and as you come to the item of induced draft fans on September 8th here (indicating), you follow this line up and there is the percentage of installation on September 8th, that was installed at that time, if they completed their schedule.

Q. The number following up this line of September 8th is the percentage of work installed?

A. Yes, sir. These are the calendar days (indicating). On September 8th, which is here (indicating),—this should be October 8th. I have been saying right along “September 8th.” I wonder if it could be understood that should be October 8th?

(Testimony of William Edward Joslin.)

They were ninety per cent completed, and at the rate of 5.88 per cent completion per calendar day they would have completed that work in two days, which would have been on October 10th.

Q. When did they complete?

A. I don't know that I have that. That is the last date I have, October 10th.

Q. How much was completed at that time? [749]

A. Well, there was 98.8 per cent.

Q. Was there any shortage of material on that work? A. No shortage of material there.

Q. Now, go ahead with the next item.

A. Well, the same thing on boiler No. 2. They proposed the same number of days, seventeen calendar days, an average of 5.88 per centage completion per calendar day. Their schedule shows that they were ninety-four per cent complete on October 20th,—no; they were one hundred per cent complete on October 20th, as shown here, so there is no question about that one. Now, on boiler No. 3 they show an additional nineteen calendar days to complete, or five and twenty-six one-hundredths per cent completion per calendar day on the forced draft fans,—this is on boiler No. 3.

Q. Now, point that out on this chart that I am indicating.

A. Here on the large chart it is reflected, nineteen calendar days, and the average percentage of completion per calendar day of 5.26 per cent, as shown here. On October 20th, the day this boiler was completed, they were 57.4 per cent completed

(Testimony of William Edward Joslin.)

on this work, which at the same rate at which they proposed to perform, would have completed the job on October 28th, and they did complete on October 28th, on the day that they proposed to complete, so there was no delay here. Now then, this is the ash and soot hoppers. [750]

Mr. Gibson: This exhibit is marked and is now offered, if the Court please, as the Defendant's next exhibit, which would be Exhibit S.

(Whereupon document referred to was marked Defendant's Exhibit S, for purposes of identification.)

The Court: Is there any objection?

Mr. Watts: We have no objection.

The Court: Then it may be admitted. And that is what?

Mr. Gibson: Exhibit,—Defendant's Exhibit S, your Honor.

(Whereupon Defendant's Exhibit S. for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing): And that is what, Mr. Joslin?

A. That shows the ash and soot hoppers.

Q. And it is an enlargement of the segment of Exhibit No. 62 offered and admitted as Plaintiff's exhibit, that portion of the work designated as ash and soot hoppers?

A. Yes, sir; item No. 5 of segment 3, boiler No. 1; also item No. 6, segment 4, boiler No. 2; and item 8, segment 5, boiler No. 3. That is all reflected on this chart.

(Testimony of William Edward Joslin.)

Q. You have been talking about Plaintiff's Exhibit No. 62? [751]

A. Yes, sir; their proposed schedule.

Q. All right, Mr. Joslin. What did it call for?

A. From July 19th to September 8th, and it shows that between September 14th,—let me correct that last statement: It was from September 14th to September 30th.

Q. And that shows what?

A. Their proposed schedule shows a total of seventeen days to complete the ash and soot hoppers.

Q. Will you point that out on the lower exhibit?

A. Yes, here it is on there (indicating),—their proposed schedule right here (indicating). Now here is the item we are discussing, the ash and soot hoppers, their proposed schedule, and it is reflected up here on this enlarged chart. It shows seventeen days operation to complete the ash and soot hoppers, at an average of 5.88 per cent completion per calendar day on boiler No. 1. They completed the work on boiler No. 1 September 8th and started on this ash and soot hoppers on September 14th; maintaining their own schedule they would have been one hundred per cent complete on September 30th. They proposed to do it in that length of time. There was no shortage of material, and they actually started so that they should have completed on September 30th, but they did complete on October 20th. That was on boiler No. 1, and on boiler No. 2 this is the date (indicating) that it should have been

(Testimony of William Edward Joslin.)
completed, [752] but this is the date (indicating) that it was actually completed. They proposed to complete this work on September 18th,—no; that is wrong; it was on October 8th, but they started here prior to the proposed date. They started back here (indicating). They proposed to complete this work between September 15th and October 8th, a total of twenty-four calendar days, with an average of 4.16 per cent completion per calendar day on this boiler No. 2, and that work should have been completed, with the work on this boiler, on October 20th, but they actually completed on October 27th, on which date they were 87.7 per cent complete, which is reflected on this exhibit (indicating). Now, that is according to their own schedule. They were to complete the work on the ash and soot hoppers on November 2, but they actually completed,—or, rather, they were still incomplete on November 10th. In fact, very few of these items have been entirely completed. On boiler No. 3,—I will go to that now,—they proposed to complete this work on boiler No. 3 between September 21st and October 13th, an average of 4.34 per cent completion per calendar day. The boiler was completed on October 20th, and they should have been completed with this work on October 31st, because on October 20th they were fifty-five per cent complete with the ash and soot hoppers on boiler No. 3 as reflected in their progress schedule, allowing the schedule of 4.34 per cent completion per calendar day, they would have been one hundred [753] per cent complete on October 31st.

(Testimony of William Edward Joslin.)

Q. What did happen?

A. Well, what did happen was that on November 10th on boiler No. 3 they were still incomplete. They were 96.7 per cent complete on boiler No. 3; and on boiler No. 2 they were 99.2 per cent complete on that boiler on November 10th, and on boiler No. 1 they were complete.

Q. That is not giving any consideration to the extra days they were entitled to by virtue of the increase in the contract? A. No.

Q. Now, what is the chart you have put on the board, Mr. Joslin?

A. That is the enlargement of the brickwork which is represented on the Power Service Corporation schedule, which has been marked and admitted as Exhibit No. 62.

Q. And this exhibit which you have put on the board now is marked as Defendant's Exhibit "T"?

A. Yes, sir.

(Whereupon document referred to was marked Defendant's Ex. T for purposes of identification.)

Mr. Gibson: We will offer that in evidence, if the Court please.

Mr. Watts: We have no objection. [754]

The Court: It may be admitted.

(Whereupon Defendant's Ex. T so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) Now you said this covered what? A. The brick work.

Q. And that is set forth in Exhibit No. 62?

A. Yes, sir.

(Testimony of William Edward Joslin.)

Q. Can you indicate that for the record, Mr. Joslin?

A. Yes. It is set forth as Item No. 3 on segment 3, boiler No. 1; as Item No. 4, segment 4, boiler No. 2; as Item No. 5, segment No. 5, boiler No. 3. The Power Service Corporation's schedule shows thirty days to complete the brickwork on boiler No. 1, between the dates of August 26th and September 24th, thirty calendar days, or an average completion of 3.33 per cent completion per calendar day. That is on boiler No. 1, and the brickwork was completed prior to November 10th, so there is no question about that. On boiler No. 2 the Power Service Corporation's schedule shows thirty days to complete this brickwork, between September 1st and [755] September 30th, an average completion of 3.33 per cent per calendar day, between September 1st and September 30th. The Power Service Corporation started the work on August 31st, on boiler No. 2, and on the date the boiler was completed—not when it should have been—but when it was completed they were thirty-eight per cent complete with the brickwork. Maintaining their own schedule and working two shifts they would have been one hundred per cent complete on November 6th, the date that they completed the boiler. On boiler No. 3 the Power Service Corporation's chart, or schedule, shows thirty days to complete the brickwork. That would be thirty calendar days, and an average completion of 3.33 per cent per calendar day.

(Testimony of William Edward Joslin.)

Q. During what period of time?

A. Between September 6th and October 5th. Boiler No. 3 was completed on October 20th at which time the Power Service Corporation was eighteen per cent completed with this work.

Q. As to what item was that?

A. The brickwork, and maintaining their own schedule with two shifts they would have been completed on October 31st. On this same chart we have included—

Q. (Interposing:) What date did they actually complete on boiler No. 2 and boiler No. 3—if I could have the last schedule showing the completion date? [756]

A. I don't think it is extended to the completion.

Q. They carry it to what time?

A. November 10th.

Q. Does that show what per cent was complete of the brickwork on boilers Nos. 2 and 3?

A. Yes, sir; on boilers Nos. 2 and 3 on November 10th, let's see—on boiler No. 2 the brickwork was sixty-seven per cent complete, and on boiler No. 3 the brickwork was fifty per cent complete as shown on their schedule which shows the percentage of work on each reported week.

Q. Have you any previous reports which show these figures, that is, which show a different amount of completed work from this exhibit?

A. If I can have exhibit of August 25th, September 1st, and September 8th, I think that will

(Testimony of William Edward Joslin.)

show the progress and the percentage of completion during those times.

Q. One certain percentage of completion is shown, that is when a certain segment has been completed to a definite fixed degree that percentage is set forth on the chart as of the particular date and then we will say there is no more work done on that until some subsequent date. All of the charts carry that same figure until the work is again taken up or until it is completed?

A. No; that is not as I understand it. [757]

Q. Will you explain it?

A. Yes. This chart (indicating) shows percentage of completion as of that date at 33.3 per cent.

Q. And what particular work is that?

A. That is on the drums, tubes, and headers here (indicating). And the next report is seven days later and that shows 53.9 per cent complete, and down here it shows 58 per cent. The next week it shows 63.8 per cent; the next is 86.3 per cent; the next week is 95.9; the next week shows 99.7 per cent complete; the next is 99.7; and also the next.

Q. That is assuming that the work has been completed?

A. Well, the work would have had to have been all done to show any increase.

Q. If no further work was done that percentage would remain the same?

A. On October 20th with the drums, tubes and headers, 99.7 per cent complete, to all intents and purposes that job was entirely completed, because the work all ceased.

(Testimony of William Edward Joslin.)

Q. On the subsequent reports, it shows what?

A. The same percentages, because all work ceased.

Q. Now, Mr. Joslin, just proceed with the next item.

A. Well, it is on this same chart. We carry the ash hopper lining, which is a part of the brickwork, and they are shown on boiler No. 1 as Item No. 6, under segment No. 3. [758] That is Exhibit No. 62, which would be the plaintiff's exhibit. It is Item No. 7 on boiler No. 2, and Item No. 8 on boiler No. 3. On boiler No. 2 it is shown as segment No. 4 and boiler No. 3 is shown as segment No. 5, and, as I said, they are all shown on Plaintiff's Exhibit No. 62, which is a Power Service Corporation's schedule, and it shows that seven calendar days were needed to complete the ash hopper lining, an average of 14.28 per cent completion per calendar day. Now, that was on boiler No. 1. That work was completed on October 20th, and the boiler was also completed. On boiler No. 2 the schedule shows between October 6th and the 13th, which was seven days, that it required to complete this ash hopper lining, an average of 14.28 percentage of completion per calendar day. Boiler No. 2 was completed on October 27th.

Q. You mean as to what phase of the work?

A. The drums, tubes and water-wall headers. There was nothing to stop the operation from then on, and the Power Service Corporation was twenty-five per cent complete at that time.

(Testimony of William Edward Joslin.)

Q. As to what item were they twenty-five per cent completed?

A. The ash hopper on the date of completion of the boiler, and maintaining their own schedule they should complete the work on October 30th.

Q. Have you a record to show when it was completed? [759]

A. On November 10th the ash hopper lining was 96.7 per cent complete—no; that was on boiler No. 3, but on boiler No. 2 the ash hopper lining on November 10th was 80 per cent complete. It was 25 per cent complete on the date the boilers were finished, and two weeks later they were 80 per cent complete. In ten days they accomplished less than fifty per cent completion. On boiler No. 3 the schedule shows the ash hopper lining to be completed between October 13th and October 20th, an average of 12.5 per cent completion per calendar day. There were eight days allowed for this work. On October 20th the Power Service Corporation completed boiler No. 3 on the drums, tubes and headers, and at that time they were five per cent completed on the ash hopper lining, and by working two shifts—

Q. Where is that reflected, Mr. Joslin?

A. That would be reflected right here (indicating).

Q. Now, go ahead with your explanation?

A. By working two shifts they would have completed on October 24th, according to their own schedule. We carry this at two shifts, which in my opinion, was not necessary. They could do it on one shift.

(Testimony of William Edward Joslin.)

Q. Would it have been possible to work a shift on the brickwork, and a shift on the ash hopper at the same time?

A. Yes; it would have been possible. They could have completed this work on the same date as boiler No. 1 was [760] completed.

Q. Now, does that cover all of the items shown on Exhibit "T"?

A. Yes; that covers exhibit "T", and the next we have, is this exhibit which is marked "U".

(Whereupon document referred to was marked Defendant's Exhibit "U" for purposes of identification.)

Mr. Gibson: I now have proposed Defendant's Exhibit "U", and after identification I will offer that.

Mr. Watts: We have no objection to this going in.

The Court: Then, if there is no objection, the exhibit may be admitted.

(Whereupon Defendant's Exhibit U, was so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson): Will you identify it, Mr. Joslin?

A. This is an enlargement of the Power Service Corporation's schedule on boiler exterior casing on boilers No. 1, No. 2, and No. 3. It is designated as Item No. 4, segment No. 3, boiler No. 1; Item No. 5, segment No. 4, boiler No. 2; Item No. 6, segment No. 5, boiler No. 3.

(Testimony of William Edward Joslin.)

Q. On what exhibit?

A. On the Plaintiff's Exhibit No. 62.

Q. On one exhibit—Plaintiff's 62, it says boiler exterior casings, and on this, which is your enlargement, it says "boiler [761] casings." Boiler exterior casings and boiler casings are the same, are they? A. Yes, sir; they are the same.

Q. Then the subject matter covered on both of the exhibits, or both charts, is the same?

A. Yes, sir. On boiler No. 1 the drums, tubes and water-wall headers were completed on September 8th. This work was also completed on time, so there is no question on that. On boiler No. 2 the drums, tubes and headers were completed on October 27th, and if they had maintained and followed their own schedule they would have been completed on the 20th.

Q. As to what item?

A. As to the drums, tubes and headers. The Power Service Corporation's schedule shows the completion of the casings between September 27th and October 14th. Their proposed schedule of eighteen calendar days, or an average of five and fifty-five one-hundredths per cent completion per calendar day on boiler No. 2.

Q. Now, will you point that out on the exhibit 62, Plaintiff's Exhibit 62?

A. This exterior casing, that is Item No. 6 under boiler No. 3, right here (indicating). They proposed to complete between this date and this date (indicating) in their own chart. [762]

(Testimony of William Edward Joslin.)

Q. What dates are those?

A. September 27th, represented by this date, or line, and October 14th, which is represented by this line (indicating).

Q. You are referring to Exhibit No. 62?

A. Yes, sir; to Item No. 5, segment No. 4, under boiler No. 2. Now, I go to boiler No. 3. They proposed to complete between the dates of October 3rd and October 20th. They allow eighteen calendar days to complete, or an average of 5.55 per cent completion per calendar day, on boiler No. 3. This is represented on their schedule as Item No. 6, under segment No. 5, boiler No. 3, which shows the dates between October 3rd and October 20th. On the date that No. 3 boiler was completed the Power Service Corporation shows the casing as fifteen per cent completed, and had they followed their own schedule they would have been one hundred per cent complete on the boiler exterior casing on November 5th for boiler No. 3, and I don't know whether I said, or not, that on boiler No. 2 on the date that the boiler was completed the tubes, drums and headers were completed. The Power Service Corporation's schedule shows twenty-five per cent of the exterior casing as completed on that date.

Q. That is as to what item again, Mr. Joslin?

A. On the boiler exterior casing, and following their own schedule on that they would have been completed on November [763] 10th, one hundred per cent complete.

Q. Was that involved in overtime?

(Testimony of William Edward Joslin.)

A. No, sir; that is with regular shifts.

Q. At that time there was no shortage by reason of any delay in delivery or any other reason?

A. There was no shortage of material on these items at all.

Q. Was there any conflict between working on the casings and other items of construction going on at any time?

A. The brickwork and boiler casings could have been carried on together as they were in boiler No. 1, as it is reflected by the Power Service Corporation's schedule, which shows the brickwork on October 20th was one hundred per cent, or ninety-eight per cent completed, and they ceased operations, and the ash hopper lining was completed on the same date. These items could have been carried on simultaneously and completed on the same date as they did on boiler No. 1. These charts cover all the items under segment No. 3 on boiler No. 1; segment No. 4 on boiler No. 2; segment No. 5 on boiler No. 3. They were completely shown there with the exception of boiling out of the boiler, and no chart was made of that for the reason that that part of the work was deleted from the Power Service Corporation's contract and later reinstated at a price submitted by the Power Service Corporation, which was approved by the contracting [764] office, and for which they were paid, and that reinstatement was beyond November 10th, I believe.

Q. Calling your attention to the document which is marked as Defendant's Exhibit "V", will you describe that?

(Testimony of William Edward Joslin.)

(Whereupon document referred to was marked Defendant's Exhibit "V" for purposes of identification.)

A. This document covers items under segment No. 1, which are designated as "piping," and it covers items one, two, three, four, five, six and seven, the items of exhibit No. 62 under segment one, "piping systems." The miscellaneous piping was omitted from this chart because miscellaneous piping covers odds and ends, or miscellaneous items which could be, and was, done, at the time the Power Service Corporation was off the other work.

Q. Was the material for miscellaneous items available there?

A. All of the items for the miscellaneous piping were at the site and available at any time.

Q. And would that come under miscellaneous items of odds and ends?

A. Yes, sir, and we have omitted that item from our chart.

Mr. Gibson: At this time I will offer, for illustrative purposes only, Defendant's Exhibit V.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit V, so marked for identification, was admitted in evidence.)

A. This is item No. 1 under segment 1 of Exhibit No. 62, the Power Service Corporation's construction schedule, and on their schedule dates it is between July 17th and October 11th.

Q. That represents what?

(Testimony of William Edward Joslin.)

A. The time to install the main and auxiliary piping, high power steam pressure.

Q. Is that their proposed schedule?

A. Yes, sir; that is the days proposed to be required for the completion, the time in which they would have completed the auxiliary and main high pressure steam piping. They started on August 8th and maintaining their schedule—this exhibit shows that on October 27th, the date on which the last boiler was completed as to tubes, drums and headers, on this work they were 98.4 per cent complete, and the day the last boiler was set as to tubes, drums and headers.

Q. On what segment is that?

A. That is on the high pressure steam piping, and maintaining their own schedule they would have been completed easily in two days, at an average of 1.09 per cent per day.

Q. In two days from what time do you refer to now? [766]

A. From October 27th, the date on which the last drums, tubes and water-wall headers were erected and in place.

Q. Is that on all three of the boilers, Mr. Joslin?

A. Yes, sir; on all three of the boilers.

Q. Does it show when they did complete the work so far as their exhibit—exhibit No. 62, is concerned?

A. My exhibit shows that on November 10th they were 94—no; that is 99 per cent complete, on November 10th.

(Testimony of William Edward Joslin.)

Q. Then you may go ahead now with the next item, if you have finished.

A. The next item is Item No. 2 designated as "boiler feed discharge and suction," and that is in segment No. 1—I don't recall whether I said on this first item of the main and auxiliary high pressure steam piping they showed that they intended, or their schedule called for eighty-seven calendar days at an average of 1.15 per cent completion per calendar day on that piping, and they were not finished until—well, it shows they were 98.4 per cent complete On October 27th, and could have been completed in two days, easily, had they followed their own schedule, and then, as I told you, they were not quite complete, but for all intents and purposes it was completed on November 10th. Now, on this item which is designated "boiler feed discharge and suction," their schedule was for ninety-one calendar days between July 20th and October [767] 18th, for an average of 1.19 per cent completion per calendar day.

Q. And that is according to what?

A. That is according to their own schedule, and on the date of the completion of the boilers as to drums, tubes and headers, they were completed on this item, so there is no question about that. They show 99.2 per cent, so that is practically completed.

Q. As of what date?

A. On November 10th, but on the last date of the boiler erection—that is, on the date that the boilers were erected, which was on October 27th,

(Testimony of William Edward Joslin.)

they were 98.7 per cent completed, so we granted them as being one hundred per cent complete. They were practically completed at any time within two or three days of the time the boilers were completed as to the tubes, drums and headers.

Q. Now then, go ahead with the next item, if you have finished with Item No. 2.

A. The next item, No. 3, is designated as "low pressure steam and exhaust," under the piping systems on segment No. 1 of Exhibit No. 62. Their proposal was to do this work between July 31st and October 17th. However, they started on August 5th. Their proposal shows an average of 1.27 per cent completion per calendar day, with seventy-nine calendar days [768] to complete the work. On the date the last boiler tubes, water-wall headers and drums were in place—

Q. Which was on what date, Mr. Joslin?

A. On October 27th. At that time they were 95 per cent completed with this work as reflected on their exhibit No. 62.

Q. Can you point that out on their exhibit?

A. Yes; Item No. 3 on October 27th was 95 per cent completed as reflected in their exhibit, and maintaining their own schedule they would have completed in six days from October 27th.

Q. With one or two shifts?

A. With one shift.

Q. When did they complete, or what percentage was completed by November 10th?

A. On November 10th they were 98 per cent

(Testimony of William Edward Joslin.)

completed—I wonder if I gave the correct figures on Item No. 2? No. 2 shows here that they were one hundred per cent complete on November 10th, so there was no question about that. In fact, they were one hundred per cent complete on the date the tubes and headers and drums were in place. On Item No. 3 they were 98 per cent complete. Now, shall I go ahead with Item No. 4?

Q. Yes; just proceed. [769]

A. Item No. 4 is designated in Plaintiff's Exhibit No. 62 as "treated, softened and filtered water—cooling water"—it is under the piping system, and segment No. 1 of Exhibit 62, and it is Item No. 4. The Power Service Corporation's schedule shows that they proposed to do this work between July 31st and October 30th. The proposed completion date was October 30th, or ninety-two calendar days for an average of 1.08 per cent completion per calendar day. They started early; they started on July 26th, and on the date the last drums, tubes and headers were in place, on October 27th, they were 94.5 per cent completed on this work. Had they maintained their own schedule they would have completed in six days from October 27th.

Q. Does the record show what percentage was completed on November 10th?

A. On November 10th they were 96.7 per cent complete.

Q. And is that what you have reflected on the large chart?

A. Yes, sir. That is reflected on the large chart,

(Testimony of William Edward Joslin.)

and their actual percentage of completion is shown here on my large chart, as I say, and it is also shown on their proposed schedule—this (indicating) is the actual percentages.

Q. And they are taken from exhibit No. 62, are they? A. That is right. [770]

Q. Now, go ahead with the next item, if you have finished.

A. Item No. 5 is represented on Exhibit No. 62 as "boiler and W.W. blow-off, condensed blow-down."

Q. What does "W.W." mean?

A. Water-wall. That is also under the piping system, under segment No. 1 of Exhibit No. 62. It is Item No. 5. They proposed to start on September 20th and to complete on October 30th. They have allowed forty-one days for the completion, or an average of 2.44 per cent completion per calendar day. On October 27th, the date the last tubes, drums and headers were installed, the Power Service Corporation was 97.7 per cent completed on this work, and maintaining their own schedule they would have completed in two days, and on November 10th they were 98.3 per cent complete.

Q. And they accounted for how much of that work from October 27th until November 10th?

A. Six-tenths of one per cent, as I figure it.

Q. Have you finished now with that item?

A. Yes, except that they did start on that work earlier than September 20th, and took more than their supposed number of calendar days.

(Testimony of William Edward Joslin.)

Q. Now, if you have finished go ahead with the next item.

A. That is Item No. 6 on this exhibit. It is designated [771] as "drain, vent and trap piping." That is also under the piping system on Exhibit No. 62. They proposed to start this work on September 30th and complete on October 30th, allowing thirty-one calendar days for an average of 3.22 per cent completion per calendar day. On October 27th, the date the last drums, tubes and headers were completed on these boilers, the Power Service Corporation's schedule shows that they were 78 per cent complete with this work.

Q. Can you point that out on Exhibit No. 62, Mr. Joslin?

A. Yes; this is the percentage here (indicating).

Q. Designated as seventy-eight per cent?

A. Yes.

Q. It is in the fine type?

A. Yes, sir; that is right, and maintaining their own schedule they would have been completed with this work in seven days.

Q. With one or two shifts?

A. With one shift, and on November 10th they were 92 per cent complete.

Q. So that between the 27th of October and November 10th they moved from seventy-eight per cent to ninety-two per cent?

A. That is right. Now, I will go on to the next item. [772] It is designated under segment No. 1 on Exhibit No. 62 as No. 7, "control piping and

(Testimony of William Edward Joslin.)
special valves." It is also under the piping system, which, as I mentioned, is designated as segment No. 1 of this exhibit. The Power Service Corporation's schedule shows that they proposed to start on October 11th and complete on November 10th, according to their schedule—that is, their proposed schedule, allowing thirty-one calendar days, or an average of 3.22 per cent completion per calendar day. On October 27th, the date on which the last tubes, water-wall headers and drums were in place, the Power Service Corporation's schedule shows seventy per cent of the work completed.

Q. Will you show that on Exhibit No. 62?

A. Yes. Right here (indicating), seventy per cent complete on October 27th.

Q. On the date shown here (indicating), if you follow up that line does that show the percentage of work completed on that particular date, on each item on Exhibit No. 62?

A. Yes, sir. This represents the dates, the calendar days, and this (indicating) is the percentage. It is all reflected on this exhibit.

Q. In the upper righthand corner is the percentage? A. Right here (indicating).

Q. And down here at the bottom (indicating) are the calendar days? [773]

A. Yes; these are the dates. Here is the month and here is the first day of the week (indicating), the third, eighth, thirteen, eighteenth, and so on.

Q. And the same general plan is carried out?

A. Yes, sir; that is right. On this item we just

(Testimony of William Edward Joslin.)

talked about, which is item No. 7, had they continued to maintain their own schedule they would have completed the work in ten days from October 27th.

Q. And as of November 10th what was the amount of completed work?

A. They were 92 per cent complete on November 10th.

Q. So that they picked up between October 27th and November 10th what percentage of the work?

A. Twenty-two per cent. Now then, this chart shows the over-all proposed completion of the work listed under "piping system."

Q. You are referring now to the Plaintiff's exhibit, the same one we have been using?

A. Yes, sir; the second line down from the top, under segment one it shows the over-all percentage of completion.

Q. Of what?

A. The entire items included in the piping system. Of course, as we said at the beginning, we have eliminated the miscellaneous items. We have taken their proposed progress [774] as of October 27th, the last date on which all of the drums, tubes, and water-wall headers were in place. They proposed to be—this mark here (indicating) is the proposed schedule and this is the actual work (indicating).

Q. You are referring now to what?

A. To the little figures above the cross-hatching. They are the proposed figures of completion on a

(Testimony of William Edward Joslin.)
given date, and below this bar, or line here (indicating) represents the actual percentage of completion on the given date. On October 27th the Power Service Corporation proposed on the over-all of the items under the piping system to be ninety-five per cent completed on that date. Now, that is reflected in their over-all schedule as shown on their exhibit, and it is shown on our exhibit "V" which is an enlargement of their own graph. Theirs shows their proposed completion of ninety-five per cent on that date, and their over-all completion actually was ninety-five and seventy-eight one-hundredths.

Q. How do you arrive at that figure?

A. By taking the individual units and making a total and then you divide the value of the unit—the individual unit, to get the percentage as of any date.

Q. When you mention values, are you taking the same values in evidence on Exhibit No. 62?

A. Yes, sir. [775]

Q. And where are they reflected in Exhibit No. 62?

A. In the second column from the right, or, rather, the second column on the righthand side of the exhibit.

Q. Those values, where do they come from?

A. They are the figures as submitted by the Power Service Corporation.

Q. As the proposed break-down of the various segments?

(Testimony of William Edward Joslin.)

A. Yes; of that particular segment.

Q. And—

Mr. Gibson: May I have the letter of August 10th?

The Court: Before you go on to something else, Mr. Gibson, I would like to ask the witness a question. You say ninety-five and seventy-eight one-hundredths per cent completion. Now, what does that mean in additional days?

A. That is covered by their own schedule.

The Court: But I don't want to figure it out, and I was asking you.

A. It is difficult on that to figure it, because they have required a greater period of time to complete the last five per cent.

The Court: But based on their progress chart what would it amount to in days?

A. On the progress chart it would have amounted to 16 days, but I didn't average it because of the fact that the last five [776] per cent they are asking fifteen days, to complete the last five per cent; so we take their proposed schedule as of that date which they proposed at that time to be ninety-five per cent.

The Court: That is on October 27th?

A. Yes.

The Court: What was the percentage as of that day?

A. 95.78 per cent.

The Court: What does that figure per day?

A. It won't be reflected here, because they have asked for 15 days to complete, beyond this.

(Testimony of William Edward Joslin.)

Q. (Mr. Gibson, continuing:) When they figure their schedule they arrive at 95 per cent on this particular date (indicating)? They arrived at that on a percentage—a certain percentage of completion per day? A. Yes, sir.

Q. Between 90 per cent and 95 per cent, they required five days to complete that five per cent?

A. Yes, sir.

Q. And you say between 95 per cent and 100 per cent they required fifteen days?

A. Yes; they asked for that.

The Court: What I want to know is the percentage [777] per day that they should have completed under their own proposed schedule. What percentage per day?

A. You would like to know what percentage per day they should have completed?

The Court: Yes.

A. I will have to figure that.

Q. (Mr. Gibson, continuing:) Now that is this over-all line upon which there was ninety-five per cent scheduled on October 27th?

A. They were on schedule on that date.

Q. With reference to that date, that is an average of these other items?

A. That is a composite average of these various segments. That is what they proposed.

Q. That is what they proposed to follow?

A. Yes, sir.

Q. This whole job as to that segment would be ninety-five per cent complete on that date?

(Testimony of William Edward Joslin.)

A. Yes, sir; and they were on schedule on that date. All they had to do was to maintain their own schedule from that date on.

Q. Now, Mr. Joslin, this is Exhibit "W"?

A. Yes.

(Whereupon document referred to was marked Defendant's Exhibit "W", for purposes of identification.) [778]

Q. (Mr. Gibson, continuing:) Calling your attention to this proposes Exhibit "W", will you identify that?

Mr. Watts: I have no objection to it.

The Court: Then it may be admitted, without objection.

(Whereupon Defendant's Exhibit "W" so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) Mr. Joslin, will you describe Defendant's Exhibit "W" for the record?

A. This exhibit is an enlargement of the auxiliary equipment as represented by the Power Service Corporation's schedule of segment six, which is headed, "Auxiliary equipment," and it is exhibit No. 62. It is composed of items, one, two, three, four, five and six; the last drums, tubes and water-wall headers for the boilers were placed on October 27th. The Power Service Corporation's schedule shows that item one, which is designed as "Ash handling system," on exhibit No. 62 under segment six, auxiliary equipment. On October 27th

(Testimony of William Edward Joslin.)
the Power Service Corporation's schedule shows that 93 per cent of this work was completed.

Q. As of what time was that?

A. That was on October 27th.

Q. I meant to say what item was that?

A. That was item No. 1, the ash handling system, under auxiliary equipment, on Exhibit No. 62.

Q. Can you show us where that figure is shown on Exhibit No. 62?

A. Yes, sir. That is shown on Exhibit No. 62. It is reflected on the date of October 27th, 93 per cent, and between the dates of October 29th and November 5th there was no operation on this particular work.

Q. You mean by that that there was no work on the ash handling system?

A. Yes, sir. Had the Power Service Corporation worked one or two Sundays they would have completed this ash handling system before November 10th.

Q. That is according to their own proposed schedule?

A. Yes, sir.

Q. And what percentage was completed on November 10th?

A. On November 10th they were 98 per cent completed.

Mr. Scholz: You said, I believe, if they worked one or two Sundays they could have completed some part of that work?

A. Yes; there were two Sundays during this time where there was no operation.

(Testimony of William Edward Joslin.)

Mr. Scholz: During this period of time?

A. Yes; from October 27th, between there, there was no operation on these two days.

Mr. Scholz: And these two days were Sundays?

A. Yes; and had they worked one of the two Sundays they would have completed that part of the work. Now then, on item No. 2, it is designated as "De-aerating seed water heater," under segment six of the auxiliary equipment. On the Power Service Corporation's schedule, which is exhibit No. 62 it is so designated. We don't need to go over that because it is completed. The next item is No. 3 under segment six of the auxiliary equipment, and it is listed as "boiler feed pumps and drives."

Q. Let me ask you, Mr. Joslin: The item before that, Item No. 2 was one hundred per cent completed as of what date?

A. As of October 20th, it was one hundred per cent complete. Now then, back to Item No. 3, which I said was designated as boiler feed pumps and drives; on Exhibit No. 62, which is the Power Service Corporation construction schedule it shows that the boiler pumps and drives required eight days to complete, or an average of 12.5 per cent completion for each calendar day between the dates of July 27th and August 3rd.

Q. That is according to their proposed schedule?

A. Yes. On October 27th the date that the last drums, tubes and water-wall headers were in place, the Power Service Corporation was ninety-eight per cent completed with the boiler [781] feed pumps

(Testimony of William Edward Joslin.)

and drives, and on November 10th they were 98.5 per cent completed. In other words, they had completed five-tenth of one per cent between October 26th, or 27th, and November 10th, and, of course, their schedule called for 12.5 per cent completion per calendar day.

Q. (Mr. Gibson, continuing:) Just go right ahead now, Mr. Joslin.

A. The next item is item No. 4 "Miscellaneous piping." It is item No. 4 on the auxiliary equipment, which is segment No. 6 of Plaintiff's Exhibit No. 62. The proposed date on the construction schedule of the Power Service Corporation is between July 29th and August 31st,—I am wondering if I have that one in the wrong place,—no; that is correct, the item No. 4. The Power Service Corporation's schedule shows the dates, as I said, between July 29th and August 31st, a total of thirty-four calendar days to complete this work with an [782] average of 2.94 per cent completion per calendar day. They started on July 29th, and on October 27th they were 98 per cent completed on that work, and if they had maintained their own schedule they would have completed in one day, or on October 29th, the work would have been completed, but on November 10th they were 99 per cent complete. In other words, between October 27th and November 10th they completed one per cent of this work. Now, shall I go on with the next item?

Q. Yes: go right ahead.

A. The next item is item No. 5 under segment

(Testimony of William Edward Joslin.)

No. 6 of "Auxiliary Equipment," on Plaintiff's Exhibit No. 62. It is listed as "Miscellaneous pumps and equipment." The Power Service Corporation's proposed schedule shows operation on this work between July 31st and September 30th, a total of sixty-one calendar days within which to complete the job.

Q. According to what?

A. According to their own proposed schedule. It shows sixty-one calendar days, with an average of 1.64 per cent completion per calendar day, and on October 27th, the day on which the last drums, tubes and headers were in place the Power Service Corporation was 95 per cent complete on this work, and by maintaining their own schedule they would have completed this work by October 31st, but on November 10th [783] they were ninety-eight per cent completed, or they had shown a completion of three per cent of the work between October 27th and November 10th.

Q. That is on the basis of one shift?

A. Yes, sir; one shift, and I might add here that their schedule shows that they started this work before the date their proposed construction schedule shows. They started this work on July 25th, and none of this material was missing, or delivery delayed, or any shortage of material.

Q. Now, then the next item, Mr. Joslin?

A. The next item is "Combustion control instruments." On their proposed schedule, which is Exhibit No. 62, it shows the operation on that as being between October 7th and November 10th.

(Testimony of William Edward Joslin.)

Q. What does their proposed schedule show?

A. That is what it shows. That was what I indicated. It shows the date of operation on this work between October 7th and November 10th. It further shows twenty-five days at one shift to complete this work after 45 per cent of the work has been installed on October 27th, the date on which the last drums, tubes and headers were in place. At that time the Power Service Corporation was 45 per cent completed with this work, and maintaining their own schedule, and working two shifts between October 27th and November 7th, they would have completed [784] their schedule in twelve days.

Q. Have you any schedule to show what percentage they proposed to complete?

A. Nothing except that they completed in between October 27th and November 10th twenty per cent, and they were to require twenty-five days, according to their own schedule on one shift; so on the two shift basis they would have completed in twelve days, or by November 7th.

Q. Does that cover all of the items, Mr. Joslin?

A. That covers all of the items, all of the incomplete items on the proposed progress schedule.

Q. Now, Mr. Joslin, to summarize this, will you just stand up and point to Exhibit No. 62 and reiterate the phases on which you have charts covering the specified segments,—have you enlarged charts covering every phase of the work referred under Exhibit No. 62, or are there some missing?

A. We have covered every segment, or phase,

(Testimony of William Edward Joslin.)

of the work, with the exception of some completed items. They were completed prior to November 10th, and also the miscellaneous piping, and the boiling out of the boilers.

Q. Before the recess the court asked if you would ascertain something in reference to the number of days required in connection with the completion of items,—I forget the number, or whether it was the over-all construction as shown on your exhibit “V”. Will you please refer to Exhibit “V” and [785] see if you correctly understood the Court, and are prepared to answer his query now?

A. On Exhibit “V” the Power Service Corporation showed on their own chart the over-all percentage of completion between the dates of July 17th and November 10th, a total of one hundred seventeen days, for an average completion of .85 per cent completion per calendar day.

Q. Eighty-five hundredths of one per cent in a day?

A. Yes, sir.

The Court: If they followed their own schedule, what would be the number of days required?

A. Twelve and a fraction days beyond October 27th. Now, that is covering the entire group of items.

Q. (Mr. Gibson, continuing:) However, they did allow themselves fourteen days, or fifteen days, to complete?

A. Yes, sir.

Q. To complete that five per cent?

A. Yes, sir.

Q. Because as of October 27th their own pro-

(Testimony of William Edward Joslin.)

posals shows that they intended to do 95 per cent of the work by that time, and in fact they were 95.78 per cent complete? A. Yes.

Mr. Watts: This over-all that you are speaking of, that was so far as the piping was concerned?

A. Yes. [786]

The Court: Then that made a difference of only one and a half days on that? You say it would require twelve and a fraction days?

A. Yes, sir.

The Court: I would like to have this witness give me the different items that their proposed schedule mentioned of work that was started ahead of the proposed date of construction, and completed prior to the proposed date of completion.

Mr. Gibson: And I would also like to have the witness compare this with the progress chart of an earlier date, say, in the middle of the construction, and point out what appears on this chart, and also on an earlier chart.

A. I neglected to state before that we did not make a chart for the insulation or the pipe covering. The reason was that there was no shortage of pipe covering material, and it was the Power Service Corporation's responsibility to see that work was kept up with their own schedule. It was subcontracted.

Q. You didn't make a chart of that?

A. No; I did not do that. His Honor asked if there was anything else that was not in there, and that, of course, was not included. There was no excuse,—

(Testimony of William Edward Joslin.)

Mr. Scholz: (Interposing:) Probably that would [787] be a conclusion to say that there was no excuse for something.

A. There was no shortage of any of this material.

Q. (Mr. Gibson, continuing:) Could that have been done simultaneously with the installing of the water-wall tubes and headers, or was it necessary to wait for the completion of some part of that work before this could be started?

A. No; that was insulation of the pipe work, and it did progress up to October 27th at which date the pipe work that was to be insulated was up to their proposed schedule.

Q. The insulation of what now, are we referring to?

A. The insulation of the pipe work. It should have all been in accordance with their proposed schedule.

Q. The operation of that work had nothing to do with any lack of materials, or the fact that the headers or the water-wall tubes were late in arriving?

A. No, sir.

Q. I am calling your attention, Mr. Joslin, to exhibit No. 56 and 58, which purport to be both of the same general character. They are what?

A. Progress schedules.

Q. Now, with reference to these schedules, there are certain numbers, or percentages, of completion, and proposed completion. Take the schedule that you have been working on there and point out to

(Testimony of William Edward Joslin.)

the Court how the numbers are changed, the various numbers. [788]

A. The numbers which show,—

Q. (Interposing:) Let me complete my question, Mr. Joslin: Take the schedule which you have been working on and point out to the Court how the numbers change, the ones carried underneath the black performance line, in each item, so that it will be possible for the Court to get it in mind as to the varying situations as to the percentages shown. A. Yes. Now, this chart,—

Q. (Interposing:) Which chart is that?

A. Exhibit No. 56. It is rendered on September 29th, 1944. The first item listed is "Main and auxiliary high-pressure steam," and it shows on this date that is, on September 29th, 1944, as being 87.4 per cent completed on that item.

Q. Above that line is there another number or figure which indicates what the contractor proposed to have completed?

A. Yes. Not on exactly the same date, but on September 24th, the contractor proposed to be 80 per cent complete.

Q. With the same item that you spoke of just now the main and auxiliary high pressure steam?

A. Yes, sir. There is no report on September 23rd, but there is a report on September 29th, which shows that on the 29th of September there was 87.4 per cent completion, and to average this back, there would be about one per cent per day. [789]

Q. Then they were up with their proposed schedule?

(Testimony of William Edward Joslin.)

A. They were a little ahead of their proposed schedule on this item. Now, we will take this date, October 13th, which is two weeks later,—

Q. (Interposing:) Now, what exhibit is that you are referring to now?

A. That is exhibit No. 58.

Q. That is referring to the same item?

A. The same item. They submitted another chart, however, showing the main and auxiliary high pressure steam as being the report on October 13th, and on that date it shows this work as being 93.6 per cent completed. They advance from 87.4 per cent to 93.6 per cent complete by October 13th.

Q. On what item is that?

A. That is the percentage progress on the main and auxiliary high pressure steam.

Q. Why isn't that black line brought out further on this exhibit?

A. They have stopped their black line at this point (indicating) for reasons that I don't know.

Q. If the black line indicates the percentage of completion, should not the black line reach to the number of the percentage, or to the number indicating the percentage of completion? [790]

A. It should have been carried out to the percentage but they have not carried the black line out on this exhibit.

Mr. Watts: On this item, item No. 1 of Segment No. 1 on the date in question, was the plaintiff ahead of schedule or behind schedule?

A. On this item he was behind schedule.

(Testimony of William Edward Joslin.)

Mr. Watts: That is right. The schedule shows here (indicating), the black line shows the actual performance and the cross-hatch shows what it should have been.

Q. (Mr. Gibson, continuing:) At the end it shows 93.6 per cent; does that indicate what the plaintiff,—what the completion was, or what it was on that particular date? Perhaps that is not clear. This 98.6 per cent, or, rather, 93.6 per cent, does that indicate the end of the job?

A. What it was on that date. This shows the previous week here, October 6th.

The Court: I believe I understand this chart fully now.

Q. (Mr. Gibson, continuing:) Then, Mr. Joslin, the numbers under this line change from time to time to show definitely the progress?

A. That is right.

Q. I am calling your attention now to Plaintiff's Exhibit No. 10, being a letter dated August 10th, 1944, [791] addressed to Cory, Joslin & Macnsons, Sunflower Ordnance Works, Lozier, Broderick & Gordon, Post Office Box 36, Kansas City, Missouri, and in about the middle of the page it says: "Progress estimate break-down." Will you explain to the Court what this is?

A. Yes; this is an instrument which is addressed to Cory, Joslin & Macnsons, and Lozier, Broderick & Gordon, Post Office Box 36, Kansas City. It is dated October 10th,—I mean August 10th, and is marked as Plaintiff's Exhibit No. 10, and represents

(Testimony of William Edward Joslin.)

the value break-down of the various items covered by their contract.

Q. Do these items shown here in this exhibit as the break-down value appear at the righthand side of the proposed progress schedule?

A. I do not know that they show in the same proportion. I would not know that unless I checked one against the other.

Q. If certain elements in the break-down are combined on the progress schedule there, the sum total would be the full figure put in on any segment?

A. Well, that would be an assumption, Mr. Gibson. I would not know.

Q. The total amount of that is the estimate, or the plaintiff's bid of \$448,000 for the work?

A. Yes, sir. [792]

Q. The total estimate on the progress schedule which you have before the Court, particularly plaintiff's Exhibit 62, calling your attention to the exhibit which was on the board, and which was Exhibit No. 62, on the right hand side there are sets of figures. One of them indicates, at the top, a total of \$448,000.00, which is right here (indicating)?

A. That is the total amount of the contract.

Q. And to the right is the percentage figure representing one hundred per cent?

A. That is correct.

Q. And down through the column which is headed one hundred per cent are the breakdown of

(Testimony of William Edward Joslin.)

percentages, and under the column headed "\$448,000.00" that contains a breakdown of that figure also. Now, does each figure represent the breakdown according to the plaintiff's estimate as to the cost of any particular segment of the work, opposite the amount of the figures there?

A. Yes; they do, with one exception. There is a typographical error on the item of "brickwork," which is item No. 4 under boiler No. 2. They have it in the breakdown as \$3,050.00. That is a typographical error. It should have been \$9,050.00, as it is represented on boiler No. 3 and boiler No. 1. The total of these items at the top will show that the proposed figure was \$9,050.00 and not \$3,050.00. [793] That was a typographical error, but the total of each segment at the top of the various segments total the amount of \$448,000.00.

Q. Have you prepared a graph, or a chart with reference to the labor situation from the payroll on the boilers? A. Yes, sir.

Q. Have you that available?

A. I have up to certain given dates.

Q. This is for illustrative purposes only?

A. That is correct.

Q. And it is based on what?

A. It is based on the report,—the payroll reports of the Power Service Corporation.

Q. And it has been marked as defendant's Exhibit "X"? A. Yes, sir.

(Whereupon document referred to was marked Defendant's Exhibit "X", for purposes of identification.)

(Testimony of William Edward Joslin.)

Mr. Gibson: At this time I offer defendant's Exhibit "X" in evidence.

Mr. Watts: I have no objection, if the Court please.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit "X", so marked for identification, was admitted in evidence.)

Mr. Watts: Does that represent the names which [794] appear on the payroll of the plaintiff as working on the boilers, or does it represent the names, or number of men, who were actually working for the Power Service Corporation on the job at that time?

A. This represents the boilermakers and boiler-makers' helpers, only.

Mr. Watts: O. K.

Q. (Mr. Gibson, continuing:) This came from the payrolls of the Power Service Corporation?

A. This Exhibit "X" is made up from the payroll reports submitted by the Power Service Corporation.

Q. Which have been offered in evidence as Exhibits "J," "K," and "L," I believe?

A. That is right.

Q. Now, go ahead and explain that, Mr. Joslin.

A. On July 23rd the first report shows one superintendent and a twenty-man crew, a boiler crew of twenty men. Boiler No. 1 at that time was,—

Q. (Interposing:) Is that the end of a payroll period?

(Testimony of William Edward Joslin.)

A. Yes. The first period submitted. Boiler No. 1 at that time was fifteen per cent completed. Boiler No. 2 was five per cent completed. On July 30th it shows that they had increased, that is, the Power Service Corporation had increased their man-power to one boiler superintendent and twenty-six [795] crew, that is, a crew of twenty-six boilermakers and helpers. Boiler No. 1 at that date was twenty per cent completed, and boiler No. 2 was eighteen per cent completed. The next period, August 6th, which is covered by this report (indicating), and it is made from a report submitted by the Power Service Corporation, it shows one superintendent and a thirty-nine man boiler crew. Boiler No. 1 at that time was forty-five per cent complete; boiler No. 2 was thirty-five per cent complete. On August 13th, the report shows one superintendent, a forty-eight man boiler crew, and it also shows that boiler No. 1 was fifty-nine per cent complete, and boiler No. 2 was forty-eight per cent complete. On August 20th the report shows one superintendent, a forty-seven man boiler crew. It shows that boiler No. 1 was sixty-seven per cent complete; boiler No. 2 was fifty-five per cent complete, and boiler No. 3 was two per cent complete. On August 27th, the report shows one superintendent and a fifty-one man boiler crew. It also shows boiler No. 1 ninety per cent complete; boiler No. 2 sixty per cent complete; Boiler No. 3 eight per cent complete. On September 3rd the report shows one superintendent; fifty-two men in the boiler crew; it shows boiler No. 1 as ninety-

(Testimony of William Edward Joslin.)

six per cent complete; it shows boiler No. 2 as sixty-five per cent complete; and boiler No. 3 as fifteen per cent complete. On September 10th, the report shows one superintendent, [796] and a fifty man crew on the boilers. It shows boiler No. 1 to be 99.9 per cent complete; it shows boiler No. 2 to be sixty-six per cent complete; and boiler No. 3 to be forty per cent complete.

Q. Those figures are taken from what source with reference to the percentage of completion?

A. From the progress schedules.

Q. That were submitted by the Power Service Corporation?

A. Yes, sir.

Q. And these are periodical reports as to the payroll?

A. Yes, sir.

Q. They were. Now, go ahead, Mr. Joslin.

A. On September 17th, which is the next date, it shows one superintendent, a fifty-eight man crew on the boilers; boiler No. 1 shows as 99.9 per cent complete; boiler No. 2 shows seventy per cent complete; and boiler No. 3 is at that time is fifty-five per cent complete. Boiler No. 1 is the same as on the previous report. No further operation as between those two reports is shown. The next date is on September 20th. This shows that the last water-wall tubes were delivered, but they did not increase the force at all, and on September 24th, the date of the next report, it shows one superintendent, fifty-eight crew men, and it shows boiler No. 1 as still at 99.9 per cent completion; boiler No. 2 at [797] seventy-six per cent completion, and boiler No. 3 at sixty per cent completion. October

(Testimony of William Edward Joslin.)

the first, is the next report, but there is a date shown there as September 26th, when the last water-wall headers delivered. In the report of October first it shows one superintendents, fifty-eight in the crew, and it shows boiler No. 1 as 99.9 per cent complete; boiler No. 2 as 88 per cent complete, and boiler No. 3 as 58 per cent complete.

Q. But Mr. Joslin, this report of August 24th shows boiler No. 3 at sixty per cent completion, and the report of October 1st shows it as only fifty-eight per cent complete. Now, that is going backwards?

A. That is no doubt a typographical error, and that should be,—

Q. (Interposing:) What date are you talking about now?

Q. (Mr. Gibson, continuing:) Now, you may go ahead. I think we were on the report of October the first?

A. On October first, Power Service Corporation shows one superintendent, fifty-eight men in the crew. It shows no further work on boiler No. 1, still being carried at 99.9 per cent complete: it shows boiler No. 2 at eighty-eight per [798] cent complete: and boiler No. 3 at seventy-eight per cent. The dates don't correspond exactly with these dates.

What dates are you talking about now?

A. As shown on Exhibit "X". As between the dates on these two reports it might vary one or two per cent. On October 8th, which is the date of the next report, it shows one superintendent, fifty-eight men in the boiler crew; it shows boiler No. 1

(Testimony of William Edward Joslin.)

still at 99.9 per cent completion; boiler No. 2 at 95 per cent completion; and boiler No. 3 at eighty-seven per cent completion.

Q. That is not at any variance?

A. The variation does not apply to the figure: no, sir. That is constant. On this date it shows the percentage of completion as follows: Boiler No. 2, ninety-five per cent; boiler No. 3, eighty-seven.

Q. Does it show on that date less men working in the crew?

A. Yes; there are two less men in the crew.

Q. These little blocks that you have here (indicating) they represent one day?

A. Those are as explained over here (indicating). Here is the number of men; yes, and when you are proceeding with a line which is at right angles here it shows the superintendent and crew as comparing with this number. Under the heading of [799] "Superintendent and boiler crew," each block represents one man.

Q. Then as the curve goes up or down it represents a greater or a lesser number of men?

A. Yes, sir.

Q. Now, you may go ahead and finish your explanation.

A. On October 15th it shows one superintendent, fifty-six men in the boiler crew; it still shows boiler No. 1 as 99.9 per cent completed; it shows boiler No. 2 as 97 per cent complete; and boiler No. 3 as 96 per cent complete. On October 22nd the report shows one superintendent, forty men in the boiler crew; boiler No. 1, 99.9 per cent complete;

(Testimony of William Edward Joslin.)

boiler No. 2, 99.8 per cent complete; boiler No. 3, 99.7 per cent complete. On October 29th, the report shows one superintendent and twenty men in the boiler crew; it shows boiler No. 1 99.9 per cent complete; boiler No. 2, 99.8 per cent complete; boiler No. 3, 99.7 per cent complete. No further work on the boilers,—on the drums tubes or headers on any one of the boilers, beyond October 27th. On November 25th the report shows one superintendent and twenty men in the crew. It shows boiler No. 1 as 99.9 per cent complete; boiler No. 2 as 99.8 per cent complete; boiler No. 3 as 99.7 per cent complete. There was no further work on the water-wall tubes, headers or the drums. On November 12th, it shows [800] one superintendent, twenty men in the crew; it shows boiler No. 1 as 99.9 per cent complete; boiler No. 2 as 99.8 per cent complete; boiler No. 3 as 99.7 per cent complete; and no further work done on these drums, water-wall headers or tubes from that date.

Q. Now, Mr. Joslin. from November 12th, what was the first preceding report before that which shows any additional work?

A. From October 27th until November 12th the progress chart shows no work done on the drums, water-wall tubes or headers between those two dates.

Q. Calling your attention to the graph, why did you stop at November 12th? Was that as far as you had any reports?

A. Well, I didn't continue beyond that date because, according to our graphs, and to their own progress schedules, all the work was completed on

(Testimony of William Edward Joslin.)

November 10th, and we found no necessity to go beyond that date. The water-wall tubes, the water-wall headers were the only materials claimed to be missing and it was our intention to show that at the expiration of the contract no work was being done on the boilers.

Q. The expiration date of the contract, what do you mean?

A. As stated in the original contract, not including the modifications. [801]

Q. But the modifications took it through November 15th?

A. Automatically until the fifteenth of November; yes.

Q. Will you explain what is the purpose of the progress schedule,—the proposed progress schedule, such as the one offered and presented by the Power Service Corporation, as reflected in Exhibit No. 62,—I will withdraw that,—I call your attention now to Plaintiff's Exhibit No. 51, which purports to be a progress schedule. I will ask you to examine that and ask you if you have any information, or any recollection of having the progress schedule approved by your office?

A. I never saw this progress schedule prior to here in San Francisco.

Q. Then you cannot say at this time whether or not the items appearing on the segments included in Exhibit No. 51 are reflected on Exhibit No. 62 in a general way?

A. I assume that they are reflected here on ex-

(Testimony of William Edward Joslin.)

hibit No. 62. Now, without making an examination of the entire progress schedule,—the only ones that we have are approved progress schedules.

Q. And that is in the form covered by Exhibit No. 62? A. Yes, sir.

Q. Now, just answer my other question.

A. What was that?

Q. As to the purpose of a progress schedule.

A. A progress schedule is usually prepared to cover the various segments of work involved in any contract. These segments are broken down into items, or amounts, in relation to the segments as a whole, or in relation to the particular job, or project, and combined the number of segments serve to create a unit as a whole, or a complete contract. On each item there is a proposed definite period of time in which they propose to install, or to perform, a certain piece of work. If, for example, one item would require ten days, the second item twenty days, and the third item may require thirty days,—

Q. (Interposing): You simply estimate these times for doing the work, or that particular part of the contract?

A. Yes; but it does not necessarily mean that you have to start a certain segment on a certain day, simply because you have marked that on your progress schedule, because conditions may vary throughout the contract, and you may find it to your advantage to start one segment on one date, and another on a date different than shown on the supposed schedule.

(Testimony of William Edward Joslin.)

Q. The purpose is to outline a proposed plan of operation?

A. A proposed plan of operation, and procedure, and for the purpose of securing payment on a monthly, or weekly, estimate, as agreed upon.

Q. How would the amount of money which was payable to [803] the plaintiff in this action, in conformity with the contract, be determined by reference to the progress schedule?

A. Well, you would take the different items on which a price is placed for the installation of that item,—

Q. (Interposing): Is each item on that progress schedule, or group of items, that are carried under anyone of the segments, is there a price reflected on the righthand side of that exhibit?

A. Yes; on this Exhibit No. 62.

Q. And is that for the purpose of determining the amount due the contractor under each segment?

A. Well, it is set out to represent one hundred per cent of that item, and payments are based upon the progress schedules, that is, based upon the difference between the previous payments as reported by the previous percentage shown of completion. If that is not clear, let me say it is represented by the difference between the previous percentage of completion, and the percentage of completion at the next date of submission.

Q. And that would be starting with the date the contract got under way, the first payment would be made in a month, or a week, or two weeks, or whatever time was agreed upon and had elapsed?

(Testimony of William Edward Joslin.)

A. That is correct.

Q. To determine how much money the contractor would get, [804] what reference is made to the schedule to determine that?

A. Well, if a particular item shows twenty per cent completion, you would be paid, or, rather, the contractor would be paid twenty per cent of the amount shown on the right hand column of the exhibit as to that particular item.

Q. Then that amount was the amount for one hundred per cent completion as set opposite the item?

A. That is correct, if one month would show twenty per cent completion, and the next month would show forty per cent, then the contractor would be paid forty per cent, less the twenty per cent shown previously, less any retainage.

Q. It requires a certain percentage to be held back?

A. Well, I am not so sure that this contract called for retaining any percentage. It may have, however.

Q. At any rate, when you say "retainage," you mean certain amounts held back which finally would be paid to the contractor?

A. That is right. It would be paid after the completion of the contract.

Q. With reference to the boilers,—the construction of the boilers as indicated on the construction schedule, Exhibit No. 62, can you determine from that the amount of money that the plaintiff allo-

(Testimony of William Edward Joslin.)

cated for the completion of boiler No. 1, boiler No. 2 and boiler No. 3? A. Yes, sir. [805]

Q. Now, what is that figure with reference to the first boiler? Just identify boiler No. 1, and tell us.

A. Well, boiler No. 1 of the steam generating unit, as shown under segment No. 3 of this exhibit, the proposed cost of the entire unit, including all the items of the segments, is \$59,850.00.

Q. Is there an item there that covers the boilers and tubes,—and in connection with that question, I want to call to your attention the chart that the plaintiff has offered in support of its claim of damage through loss of efficiency in the three operations; the three operations are the operations in connection with the completion of the boilers, tubes and water-wall headers.

Mr. Watts: I am frank to say if that is intended as a question I could not answer it myself. Possibly my client could. I am referring now to Exhibit 60, and for example, Mr. Borst's work covers all of that work which has been referred to as segment No. 1. There are eight classifications of work, plus part of the piping that was not covered.

The Court: Does this chart go to the loss of efficiency, the first operation as to boiler No. 1, the second operation as to boiler No. 2 and the third as to boiler No. 3?

Mr. Gibson: I think that goes to the actual construction or operation on the boilers, and not the tubes, water-walls [806] and headers in which the

(Testimony of William Edward Joslin.)

question of delay in delivery of materials was concerned, and not the question of the completion of the boiler itself. Of course, the water-walls, tubes and drums as contended by the plaintiff being delayed prevented these boilers from being finished and caused a loss of efficiency. Now, I understand this exhibit covers the whole boiler.

Mr. Watts. That is right. This chart which is hanging on this board (indicating), and referred to by the Court, is simply an enlargement of my Exhibit No. 62, or a portion of it, the latter part of that exhibit, which is now in evidence.

Q. (Mr. Gibson, continuing): Mr. Joslin, from your analysis of the progress schedule in connection with your recitals, by way of explanation of the charts which are offered in evidence, as to the time of completion of the work, and the time when the work could have been completed if the progress schedules had been maintained by the plaintiff, is it your opinion that this contract as a whole could have been completed so far as the plaintiff is concerned, by November 10th, or November 15th, or either of those dates? A. It is.

Q. With reference to either of those dates, is it your opinion that it could have been completed by November 10th?

A. I maintain that the job could have been completed with [807] a sufficient force of men by November 10th.

Q. Then, as a matter of course, with the additional five days there would be no reason to have so

(Testimony of William Edward Joslin.)

much overtime to finish the job by the fifteenth of November?

A. It would practically have eliminated overtime entirely, that other five days.

Q. From your examination of the schedule and your knowledge of the work that went on by the Power Service Corporation, what is your opinion as to what caused the failure to complete this work by either November 10th or the 15th?

Mr. Watts: I object to that as calling for a conclusion of the witness, and it is argumentative, if the Court please.

The Court: He may answer.

A. The primary reason was the lack of sufficient force of men, most of which could be laid to the insufficient number of bricklayers, insufficient number of insulation men for the pipe covering, insufficient number of pipefitters, and insufficient number of millwrights. The boilers were completed and I would not say there was an insufficient number of boilermakers.

Mr. Gibson: Mr. Borst stated that there were numerous shortages in connection with materials required to [808] complete the performance of their contract.

The Court: Isn't it agreed, gentlemen, that these shortages are not material, and that they did not delay the construction of this project?

Mr. Watts: We admit that, your Honor.

The Court: I think it is admitted, and has been several times, that no delay was caused by any shortage except of water-wall tubes and headers.

(Testimony of William Edward Joslin.)

Mr. Watts: That is correct. It certainly is. There is no claim by either party.

Mr. Scholz: By either party,—what do you mean by that, Mr. Watts?

Mr. Watts: I mean that Mr. Joslin nor us claim that this shortage, if there was a shortage of any other materials, caused any delay.

The Court: There is no claim by the plaintiff that these other materials were not there in good time.

Mr. Sholz: I understand that it is admitted and stipulated that the alleged delay was due only to the shortage of tubes and headers, if any, and by that we don't want to stipulate that there was a delay due to any shortage.

The Court: I understand the only contention of the plaintiff is that the damage was caused because all of [809] the water tubes and headers were not delivered on time.

Q. (Mr. Gibson, continuing): Calling your attention to Exhibit No. 4, which has been admitted, do you remember of having seen that letter, which I presume was received by your office, that is, the original was?

A. Yes; I remember the letter.

Q. As of July 26th, 1944, had an approved progress schedule been presented and approved by you, or the A.-E.-M.?

A. Not to my knowledge.

Q. Not to your knowledge? A. No.

Q. Is it your recollection, or your knowledge,

(Testimony of William Edward Joslin.)

that the progress schedule as finally presented was approved on what date?

A. I believe it was on August 22nd, 1944.

Q. That does not mean that August 22nd was the date upon which the Power Service Corporation presented it?

A. I don't know when they presented it.

Q. With this letter of July 26th in your possession, would it have been possible for you with the knowledge you had to determine what tubes were required by the Power Service Corporation to be delivered by August 1st, August 8th, and August 15th, or any other time? [810]

A. No; it would not, and I could not form any conclusion on that. It could be that they wanted all of the tubes.

Q. Assuming all of the tubes are included by that, does that comply with the requirement of the contract as to requisitions?

A. No; it does not.

Q. Would that letter give you any assistance in applying to the A.-E.-M., or to any other agency for aid in procuring tubes? Would it be any information upon which you could go to ask for tubes as requested in the general terms of the letter?

A. The only information that would give me would be notice that I would expect a requisition to follow,—to follow that letter, in which specific tubes would be requisitioned.

Q. Do you have any recollection as to when you

(Testimony of William Edward Joslin.)

received your first requisition for tubes, or when your office received the first requisition for tubes?

A. If my memory serves me correctly, it was August 19th, 1944.

Q. You said August 19th? A. Yes, sir.

Q. That was the date of the requisition?

A. Yes, that is, if my memory serves me correctly, it [811] was the date.

Q. I call your attention now to a carbon copy of requisition dated August 19th. It is material requisition No. 26, addressed to Cory, Joslin & Macnsons, and consisting of a number,—no; consisting of two pages, and is a part of plaintiff's Exhibit No. 20. I will ask you if that is the document that you were talking about, and were attempting to recall, or did recall?

A. That is the one; yes, sir.

Q. Prior to the receipt of this requisition in which certain items are specified,—will you just read a few of those, Mr. Joslin?

A. Yes. First, there is three each F-4-R-L three inch by twenty-hundredths furnace tubes,—these were all in relation to furnace tubes.

Q. And no water-wall tubes?

A. That is right.

Q. Is there anything in this requisition No. 26 that refers to water-wall tubes, if you can determine?

A. No; I see no reference to water-wall tubes, other than the fact that they are mentioned in this requisition.

(Testimony of William Edward Joslin.)

Q. You mean by that in the first paragraph, but not under the list of items requested?

A. In the first paragraph, yes. [812]

Mr. Gibson: The requisition reads as follows, after the address and date, and the subject,—the requisition is for the attention of Mr. Ralph J. Jung:

“Gentlemen:

“As a matter of record we wish to confirm our verbal advice on the shortage of water-wall tubes for boilers No. 1, No. 2 and No. 3. The tubes were found to be short on July 14th, 1944, and the matter discussed with Major Matthews, Captain Overesh, Mr. D. C. Smith of Lozier, Broderick & Gordon, and Mr. Ralph J. Jung of Cory, Joslin & Macnsons.

“These tubes to be furnished by Combustion Engineering Company are as follows,—”

And then it lists the items to which reference has been made.

Q. (Mr. Gibson, continuing): Are those the items you referred to, Mr. Joslin?

A. Yes. I might explain further that these tubes may have been on requisition before, and on previous requisitions as furnace tubes, and the plaintiff may have taken this off some information that he secured, and the tubes listed here may not have been furnace tubes.

Q. They are indicated as furnace tubes, but they may have been water-wall tubes; is that right?

A. Yes; they could have been tubes that related to that particular operation. [813]

(Testimony of William Edward Joslin.)

Q. Was that the first real requisition under the contract from the plaintiff to furnish materials in reference to the boilers,—particularly with reference to the tubes?

A. Received by our office; yes, sir.

Q. In connection with the erection of the three boilers, do you know how many furnace tubes would be required by the three furnaces and the erection of the boilers?

A. Combined furnace and boiler tubes would be about thirteen hundred and thirty per boiler,—approximately four thousand for the three boilers.

Q. And the water-wall tubes?

A. About seven hundred fourteen water-wall tubes.

Q. For the three boilers? A. Yes, sir.

Q. So that the actual shortage would not prevent the commencement of the installation at any time proposed, or contemplated, by the plaintiff?

A. No; the operations would be the supporting steel,—was the first operation; the drums, the second operation; the furnace boiler tubes and baffles the third operation; and the water-wall tubes, the fourth operation, at which time progress could be maintained on all three boilers.

Q. Do the progress charts show that progress was being made during that period of time? [814]

A. The progress charts show that progress was being made on three boilers, with the exception of one week on boiler No. 2,—the progress I am referring to involves the tubes,—on boiler No. 2 be-

(Testimony of William Edward Joslin.)

tween September 8th and September 15th; there was no operation on boiler No. 2 at that time, but progress was had on boiler No. 3, and between those dates the work had been completed on boiler No. 1.

Q. Calling your attention to requisition No. 22 in exhibit No. 20, which is dated August 17th, 1944, and is addressed to Cory, Joslin & Macnsons, which was prior to the exhibit which has just been shown to you, now, Mr. Joslin, do you recall having received that, or seeing it after it was received in your office? A. Yes; I saw this.

Q. Among other things, what does that cover with reference to tubes?

A. It covers various items, including water-wall tubes.

Q. Does it indicate from what source the requisition,—or, rather the information put in the requisition was compiled from?

A. Yes, it indicates that. It says: "We hereby confirm the following list of Combustion Engineering Company material shortages which was given to Mr. Neubauer of Hercules on August 11th, 1944, by Mr. Elmer Bennett, erector of the Combustion [815] Engineering Company."

Q. And then follows what?

A. Then follows the list of tubes.

Q. After that list there is also another list?

A. Yes; after that list there is another list, "The following list of Combustion Engineering Company tube shortages was given to Mr. Neubauer of Hercules on August 5th, 1944 by Mr. Elmer

(Testimony of William Edward Joslin.)

Bennett, the Combustion erector," and then there is a list of tubes.

Q. And that requisition — the first paragraph starts out with a clause indicating that this list was furnished by someone else?

A. That is right. This was not a result of any inventory.

Q. Will you just read it?

A. Yes. "Gentlemen: We hereby confirm the following list of Combustion Engineering Company material shortages which was given to Mr. Neubauer of Hercules on August 11th, 1944, by Mr. Elmer Bennett, Erector of the Combustion Engineering Company."

Q. And this is requisition No. 22, which was the first you received on this matter—you were in error as to the 19th of August being the date?

A. Yes.

Q. This requisition does not purport to be a result of [816] any inventory taken by the plaintiff as to actual materials being absent, or any material on the site?

A. No; it does not.

Q. Until you had a list and requisition in your possession was there anything that you could do in expediting the materials involved in that requisition of August 17th, covering the items involved in that particular requisition?

A. Until we received this requisition there was nothing that we could do toward expediting the materials, no, sir; not until we received the requisition stating what they wanted.

(Testimony of William Edward Joslin.)

Q. In your opinion, did this requisition of August 17th comply with the terms of the contract as to giving sufficient details to identify the equipment—was it within the terms of the contract?

A. I would say it would be within the terms of the contract, if that information could be developed from the requisitions.

Q. It does not make any difference where the information comes from, if it sufficiently describes the articles wanted to enable your force to take steps to procure the materials?

A. Yes, sir; that is right.

Q. As compared to the letter of July 26th,—

A. (Interposing:) I don't think there is any comparison, or any connection, between the two. The last was a requisition, and we certainly could not order on the first one. [817]

Q. During the full course of your operations with the plaintiff in the performance of his contract, did you and your force under your direction cooperate to try and obtain the materials requisitioned by them as rapidly as the materials could be procured?

Mr. Watts: I object to that. I think that calls for a conclusion. Let him state what was done.

The Court: I think I will let him answer.

A. We most certainly did.

Q. At the time the requisition dated August 17th arrived were you at that time at Sunflower?

A. That I am not sure of. I was at Sunflower in August prior to the twelfth, but I left Sun-

(Testimony of William Edward Joslin.)

flower for a trip to Minneapolis and returned to Sunflower. The exact date of the trip to Minneapolis and the date of my return to Sunflower I am not positive about.

Q. If there is an exhibit signed by you about the 12th of August would that have been signed at Sunflower, if it is headed Sunflower?

A. Yes, sir.

Q. Another letter in which you replied to Mr. Wedlick, with reference to the Fegles Construction Company's letter—it indicates on the letter head which is dated Aug. 28 that it came from San Francisco. Was that letter sent from San Francisco?

A. That letter was sent from San Francisco.

Q. The contract in this case has a clause, being Article Sixteen of the contract—the formal contract itself, it is on page 8-F, and is as follows: "This subcontract shall be subject to the written approval of the A-E-M, and the Contracting Officer, and shall not be binding until so approved." Have you any explanation as to the purpose of that clause?

A. All contracts were subject to the approval of the Contracting Officer at Sunflower. No contract could be let without his prior approval on the work covered. The contracting officer would not be presented with the contract for approval prior to the time it had been approved by the A-E-M, therefore the wording is, "This contract shall be subject to the written approval of the A-E-M, and the contracting officer, and shall not be binding until so approved." It means that it shall be ap-

(Testimony of William Edward Joslin.)

proved by the A-E-M, and submitted to the contracting officer for his approval.

Q. The presentation of this contract for signature to the Power Service Corporation was by letter of transmittal on July 14th in which they were directed to sign it. Now, before it was returned was that approval of it given by the A-E-M, or was that later?

A. It would have to have been approved by the A-E-M, and [819] the contracting officer prior to the mailing of it to the Power Service Corporation.

Q. The purpose of holding back—the written approval of the formal contract—strike that, please. Do you have any explanation as to what the plaintiff must do at the time of signing that contract to show his acceptance and compliance?

A. I don't quite get the question.

Q. I will put it this way, Mr. Joslin: At the time of the filing, do they require that the plaintiff furnish a type of bond to the Government, a performance bond?

A. A bond is called for in the specifications, and would have to be supplied by the plaintiff, and that bond would have to be approved by the A-E-M, or the contracting officer, or both, before the contract could be finally signed, but the mailing of the contract would comply with the award, and the contract would be in force pending the final approval of the bond.

Q. Calling your attention to page 1-17, sub-

(Testimony of William Edward Joslin.)

division 2-01, I will read it to you: "Order of work. The work shall be carried on at such locations and in such order of precedence as may be found necessary by the constructor. The location and limits of the work to be done shall be plainly indicated by the constructor.

"B. The subconstructor will be required to conduct [820] the work in such manner that other work in progress will not be unduly delayed. He shall cooperate and work harmoniously with other contractors at the site to the end that all of the work may be completed as expeditiously as possible." Particularly the first paragraph which I read, does that authorize you as the constructor to vary the conditions and the actual performance schedule with reference to the beginning and the completing of any item of the proposed progress schedule?

A. Do I understand you to ask if we had that authority?

Q. Yes.

A. Yes, sir.

Q. The progress schedule as proposed by the plaintiff, and accepted by the A-E-M, and approved by the Area Engineer as to completing certain segments which were to be done on certain dates, or to be commenced on certain dates, is there anything about that that is inflexible?

A. No; it was within our authority to change the work order of the Power Service Corporation, if in our opinion it was necessary to do so.

Q. With reference to the change orders for

(Testimony of William Edward Joslin.)

items of work, did the defendant, or, rather, the plaintiff, in his examination state that it was not necessary to increase the time for the modification because all of the work could be [821] done simultaneously with other work in the contract—now, assuming that was true, and he did so testify, was it possible that this could be done in view of the nature of the change orders?

A. You mean could it have been done before November 10th, the period they claim, and they refused to take the extra time because they claimed they could have done both the main contract and the modification. Now, it is difficult for me—

Q. (Interposing:) Can that answer be yes or no?

A. No.

Q. Why?

A. I do not understand how a change order issued in the latter part of November or fore part of December could be completed prior to November 10th.

Q. I am reading now from page 6-1 of the contract, subdivision; 6-02, under subparagraph one, the following clause (c): "In general it is in the intention and purpose of this subcontract to provide for the completion of Power House No. 1 in its entirety, starting with the structure in its existing stand-by status, performing all work and doing all things necessary, except as specifically specified to be done by others, and finishing with a completed power plant ready for the acceptance and operation in accordance with the full intent

(Testimony of William Edward Joslin.)
of the plans and these specifications. Various [822]
units of the work are as of the date of this sub-
contract in varying stages of completion. The fact
that one unit has been carried, by others, to a
greater degree of completion than other similar
adjacent units is not to be construed to mean that
additional work will be performed by others on
such similar units." Now, in conformity with the
first part of that clause, did the Power Service
Corporation, with the exception of the items that
were eliminated from their contract, did they com-
plete their contract within the time specified in
the contract? A. No.

Mr. Watts: During the intermission I have
talked with counsel and asked if they would mind
if we put Mr. Borst on the stand at this time to
answer the two questions that were held over, for
the reason that he would like to go home tonight,
if the Court can release him?

The Court: If it is agreeable with counsel, he
may take the stand and then he may be excused.

Mr. Gibson: It is agreeable with us.

Mr. Scholz: Yes; that is agreeable with me.

W. LYLE BORST,

recalled as a witness on behalf of the plaintiffs, having been previously duly sworn, testified as follows:

Further Cross Examination

By Mr. Gibson:

Q. One of the questions was on what date you had the greatest number of boilermakers as distinguished from helpers, what date that was, and what was the number of men?

A. On the third of October, 1944, we had a total number of thirty-six boilermakers proper, which did include the boilermaker superintendent.

Q. The superintendent, lead men and foremen?

A. Yes.

Q. The foremen, lead men, superintendent and boilermakers, as distinguished from helpers?

A. Yes, sir.

Q. That was on October third?

A. Yes, sir.

Q. A total of thirty-six? A. Yes, sir.

Q. The other question was, over the period of time from the sixth, or possibly from the thirteenth of August, how many names of the boilermakers that you lost off your payroll by voluntary relinquishment as distinguished from your termination [824] of their work?

A. I found there were four men, Mr. Biggs—

Q. (Interposing:) Give the names, will you Mr. Borst?

(Testimony of W. Lyle Borst.)

A. Mr. Biggs, Mr. Napier, Mr. Robertson, and Mr. Armoto.

Q. There was a question in my mind as to Mr. Green?

A. I haven't Mr. Green shown under that.

Q. We have Mr. Green, but I ruled him out as not being under this heading. Does your record show when he terminated? A. No, sir.

Q. Then we agree on the four, and possibly Mr. Green, which would be the fifth?

A. Yes.

Mr. Gibson: That is all.

Mr. Watts: That is all.

The Court: Then this witness may be excused?

Mr. Gibson: I have no further need for him.

Mr. Watts: Then he will leave tonight.

(Witness excused.)

WILLIAM EDWARD JOSLIN,

recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination (Continued)

By Mr. Gibson:

Q. The break-down that we were talking about right after [825] we resumed after the adjournment at two o'clock shows certain sums allocated for certain phases of the work? A. Yes, sir.

Q. Now then, have you analyzed that progress schedule as it has relation to this chart which is an enlargement of part of exhibit of No. 65?

(Testimony of William Edward Joslin.)

A. Yes, sir.

Q. Will you explain the difference in your analysis from the analysis of the plaintiff in claiming a loss of efficiency?

A. Yes, sir; I will. To me this one hundred per cent (indicating) on enlargement of exhibit No. 65, represents the cost of the first boiler, and this figure one hundred and five per cent is flexible, that is a flexible figure and it could be seventy-five per cent, or it could be one hundred fifty per cent, depending on the accuracy of the estimate of the contractor. A contractor may figure the cost of a unit at one hundred per cent, and his figure may be the actual cost. Again he may figure it at a certain figure of so many dollars, and it may be more, or it may be less; so this is variable. It could be off considerable if his estimate was off. It could be one hundred per cent, if the estimate on the unit work was accurate. If his estimate was low it could be one hundred and twenty-five per cent. If [826] his estimate is high it could represent only seventy-five per cent, or any other percentage. Now, this is important on this unit, because it represents the same cost on No. 2 that the contractor spent on No. 1, and this, No. 3, or the third operation likewise shows that the cost on No. 3, or the third, was the same cost as experienced on the first and second operations. Now, this was not a sequence operation. The progress schedule, which is represented by exhibit No. 62, shows that simultaneous operations were to be carried out on these three

(Testimony of William Edward Joslin.)

items, or the three boilers. The operations were to be at the same time. According to their progress schedule they proposed to start operation on the first boiler on July 19th; on the second boiler, on July 20th; on the third boiler, on July 25th. That is a simultaneous operation, and would take them from July 19th to July 25th on the three operations. It would take that time, possibly, to recruit a sufficient force to start operations on the three boilers. As reflected on their exhibit 62, the plaintiff has made an allowance for No. 1, or the first operation on this exhibit, in the amount of—well, for example here on this item, “tubes drums and headers,” he has an allowance on this exhibit—

Q. (Interposing:) Now, on what item is that again, Mr. Joslin?

A. Tubes, drums and headers—in the amount of \$32,800.00. [827]

Q. And for what is that?

A. The installation of the tubes, drums and headers.

Q. On what?

A. The first operation, and he likewise has estimated this same amount, \$32,800.00 right to the dollar, that he expects to charge, and to be paid, for the second operation. Now, the third operation, by this time they would have accumulated a force for the first and second operation, and they would distribute the efficiency through there, and it would hardly be likely that they would be less efficient on the third operation than on the first two op-

(Testimony of William Edward Joslin.)

erations, these being, as I say, simultaneous operations, and instead of decreasing the cost on the third operation—and, of course, I would assume that the operation on the third would be held up until the first two had progressed sufficiently so that good men could be taken from these and put on the operation of the third unit, and you will note by the exhibit that the contractor has allowed for the third operation \$33,400.00 as against \$32,800 for the operation on units one and two.

Q. He has allowed more for the third boiler than either of the other two?

A. That is correct. Now, on this chart they are shown as duplicate items, in operations one, two and three. He has allowed the same identical sums and percentages for the three, [828] all three of them. I don't understand how he can figure any loss of efficiency on that.

Q. In his estimate he set aside the same money for the first and second boilers, and a larger sum for the third?

A. That is right, a larger sum for the one operation of setting the drums, tubes and boilers, for duplicate operations.

Q. Therefore, this is less than shown by plaintiff's exhibit here?

A. Yes, this would show that he has actually gained some efficiency over his estimate by maintaining the same costs that he did here and here (indicating). These two costs are set down as identical, and this one larger, and on this exhibit the

(Testimony of William Edward Joslin.)
column "Units actually used," are identical on all three operations.

Q. Then he gained, if that is a true picture—he gained over his estimate?

A. Yes, sir. He estimated more money to complete operation No. 3, or boiler No. 3, and with the same number of men he has all three operations completed, with no additional cost.

Mr. Gibson: Does the Court understand the theory that Mr. Joslin is explaining, by using the two exhibits, No. 62 and No. 65?

The Court: Yes; I think I fully understand it.

Q. (Mr. Gibson, continuing:) Now, Mr. Joslin, what was [829] the steam—the power house steam, which was generated? What was that to be used for? What was the purpose of it? We have talked a lot about it, and I think the Court would like to know what its purpose was.

A. The steam from Power House No. 1 was primarily for the use in process work in manufacturing explosives at Sunflower.

Q. There has been testimony in the record to the effect that some of the headers—the water-wall headers were improperly fabricated with three and one-half inch openings to retain or accommodate three inch tubes, or a fraction over three inches—I am not positive as to that—but there is some testimony to the effect that the openings were too large, and that they were delayed, according to the contention of the plaintiff, a period of time

(Testimony of William Edward Joslin.)

from some time in the latter part of September until October 18th awaiting a welder from the Combustion Engineering Company?

A. Yes, sir; I believe that is correct. There was such evidence.

Q. Will you state to the Court whether or not that was an error in fabrication that could have been ascertained with reasonable diligence prior to the time the plaintiff started actually putting the tubes in that part of the boiler set-up?

A. Yes, sir; that could be ascertained prior to the time that you worked up to it. There is a difference—quite a [830] difference between three and a half inches and three inches, particularly if you are rolling tubes in that header. As I understood it, there were some nine tubes in that header, and it could have been discovered prior to the time of working right up to it. It is excusable, and maybe an oversight—as I say, an excusable oversight in not noticing it prior to the time you worked on the header; but you should see it prior to the time that you get right up to it.

Q. Is that a part of the business, Mr. Joslin, and is it considered a hazard of the contracting business that you may find at any time?

A. You may find a defect in any manufactured equipment. It is a normal hazard.

Q. Do you figure that you, as an individual, are responsible, or that there was any neglect on your part that brought that condition about?

A. No, sir; absolutely not.

(Testimony of William Edward Joslin.)

Q. I call your attention to Exhibit No. 25, which is a letter dated November 10th, 1944, from the Power Service Corporation to your organization, Cory, Joslin & Maensons, for the attention of Mr. Wedlick, regarding the completion of Power House No. 1. Now, that exhibit No. 25 purports to be a photostatic copy of a document. I will ask you if you have the original of that document?

A. I do. [831]

Q. Now, will you compare the lower lefthand corner—the stamp mark, on the original, and on the photostatic copy and tell me what date that letter was received in your office?

A. To the best of my knowledge and belief it looks like November 21st, 1944, but there is an imprint of the letter “W” that makes it very difficult for me to see the date.

The Court: What do you think it is, Mr. Gibson?

Mr. Gibson: “21” or “27.”

Q. (Mr. Gibson, continuing:) Are you familiar with the contents of this letter of November 10th?

A. Yes, sir.

Q. It states in there the dates on which the water-wall tubes would be required, and also the date of delivery, and the number of days late, and it also states in there that there was a delay occasioned—I will read this:

“A delay was also occasioned by the fact that certain other water-wall headers on Boiler No. 2 were fabricated in error and necessitated a modification of the tubes which connects to the header.

(Testimony of William Edward Joslin.)

Work was held up on this boiler from September 30th until October the 18th."

"From the above it is apparent that the progress of our work has been delayed through factors beyond our control. We, therefore, request an extension to our [832] contract completion date to December 15th.

"In making this request for additional time of completion we do not waive any rights which we have claim for additional compensation due to such delays. These claims would be in accordance with the paragraph appended to the contract which provides for such claims."

Is it your understanding this was not received until after the date set for completion of the contract?

A. It is my contention that was not received until November 21st, not earlier than November 21st, 1944.

Q. And the final modification with reference to the time was not itself disposed of until long after the plaintiff had completed and left the area—the modification which finally instead of giving it an extension, dated it back to the tenth of November?

A. That is right.

Q. After the last clause was denied by your organization they requested, or a request was made, to date the completion date back to November 10th?

A. That is correct.

Q. In regard to this exhibit No. 25, a letter of

(Testimony of William Edward Joslin.)

November tenth, had you received any notice prior to that time that there was some question of a claim for additional compensation due to the delay in delivery of water-wall tubes? [833]

A. As I remember, we had never received any direct information from the Power Service Corporation of any claim that would be filed prior to that time.

Q. You are mindful of the letter of July 19th—was that the date?—indicating possibly some additional expense would be incurred on the six weeks delay?

A. I received correspondence which incorporated a number of items of expense, totaling approximately \$41,000.00, which was prior to August 12th, but no claim was submitted for that amount of money.

Q. Was it based upon that general relationship that you had with the Power Service Corporation that you addressed a letter to the Area Engineer suggesting that this contract be cancelled?

A. It was. I found that in my files while I was at Sunflower.

Q. You didn't receive it? You mean by that that it came during your absence?

A. I found that estimate in our files, but they had not made any claim at that time, nor prior to November 21st, but I discovered the estimate in our files and that letter was a direct result of that discovery.

Q. Mr. Joslin, you have heard the statement

(Testimony of William Edward Joslin.)

made here that they were delayed under their contract by virtue of [834] the late arrival of the tubes, headers, and—I mean, of the boiler tubes and headers. Is it your opinion that the boiler tubes were late in being delivered to the site in connection with their requisition therefor?

A. I believe that the boiler tubes were delivered as quickly as it was humanly possibly to do so, and in sufficient time to permit the Power Service Corporation to complete their contract within the contract limit of time.

Q. As a part of the claim for damages there is claimed reimbursement for rental of equipment between November 10th and December 19th—or some time in December/ I am not just sure now of the date. From your estimate of the progress of the work that was done, and could have been done, was it necessary for construction equipment to be maintained there at the site of the plant after November 15th?

A. There was no occasion for equipment for the erection of the boiler—that is, for the boiler tubes, drums and headers—the water-wall headers. There was no occasion for that equipment to be maintained on the site after October 27th. Beyond that date, had the Power Service Corporation maintained their progress schedule they would have completed their work entirely on or before November 15th, at which time there would have been no occasion for equipment of any kind on the site.

Q. In your opinion was there any delay in the

(Testimony of William Edward Joslin.)
delivery of the absent of the materials from the time you received the requisition therefor?

A. I admit no delay at all. I admit, however, that there was time required to secure the materials, but I don't admit any delay in securing that material.

Q. Is there anything in the construction schedule that you testified concerning that designates a time at which any specified material must be delivered, or should be delivered, to the plaintiff for the operation,—in other words, is the construction schedule a material requisition?

A. Are you referring to this exhibit No. 62 now?

Q. Yes; that will do as a progress schedule. We will refer to exhibit 62.

A. There is no specific time that any material must be delivered. It does represent a time on which the Power Service Corporation proposed to start their operation on any given item under certain segments.

Q. In reference to the boilers, I believe they had some four thousand tubes available at that time to start work with, at the time specified in their schedule?

A. Yes, I think that is right.

Q. Mr. Joslin, I didn't learn until today what tube rolling meant. Perhaps I am imposing as to the Court's lack of knowledge [836] on this, but I will,—

The Court: You are not imposing on the Court at all. You go right ahead.

Q. (Mr. Gibson, continuing:) Would you mind

(Testimony of William Edward Joslin.)

then, Mr. Joslin, explaining what tube rolling means in connection with the erection of a boiler?

A. Well, a tube is cylindrical affair that is bent to fit between the drums. It is expanded into the drums with a tube expander.

Q. At the point that it goes into the drum, now what happens?

A. It is expanded in the drum.

Q. By the use of an instrument?

A. A tube roller.

Q. Just go right ahead.

A. Well, they set them and expand them into the drum. All of this is termed "tube rolling."

Q. Is that carried on by the boilermakers themselves?

A. Boilermakers usually spend about one half of their lives rolling tubes. This is done by the boilermakers; yes. The boilermakers' helpers finally roll tubes, or they would not become boilermakers.

Q. Working as a helper,—first, the boilermakers, or journeymen do tube rolling, and the helpers bring the tubes, [837] and help put them in place?

A. Yes; the boilermakers' helper he works along with the boilermaker, under the boilermaker's jurisdiction. He puts the tubes in place.

Q. There has been a question here of sequence of operation. Will you explain the sequence of operation in connection with this boiler operation, such as involved here.

A. On a boiler erection job you have, first, the foundation, the supporting steel, the erection of

(Testimony of William Edward Joslin.)

the drums, the tubes, the baffles,—the water-wall tubes and the baffles, and the next is the closing of all of the openings,—letting the air out and filling the system with water, and making the hydrostatic tests. You put pressure on it. That is a factor of safety. You put two and a half or three times the operating pressure, and if there is any leak that develops they are re-rolled. The brickwork is then completed,—

Q. (Interposing:) Is that after the test?

A. Yes,—of course, there is a certain part that is erected, or installed, during the erection of the job, but the brickwork cannot be completed entirely until after the hydrostatic test. There are certain casings that go along with the brickwork.

Q. Is the proposed sequence of operation broken up more than outlined,—do you think it might be broken up [838] where a crew of men put in the tubes,—the side-wall tubes on one boiler and proceeded to the next boiler and did that work?

A. If you work in series you have a simultaneous operation. You understand that ninety per cent of the work on the erection of a boiler is setting and rolling of the tubes, and the setting of the drums. The setting and installation of the steel,—that operation, if there was no steel erected at all, it would only represent a very small percentage of the erection of the boiler. You would not erect the steel on the first and then go to the second and then go to the third and erect the steel and then discharge that crew after the steel is erected. You

(Testimony of William Edward Joslin.)

just go right ahead and set the drums,—you set the supporting steel and set the drums. There was one set of drums, I understand by the Combustion Engineering Company that was done incorrectly and was re-set by the Power Service Corporation. That is comparatively a simple operation. You line the drums and the water-walls and start to rolling the tubes. Now, these boilers that we are talking about are twelve feet apart, and I cannot see why a man working on one boiler and rolling the tubes on that and then working on another boiler twelve feet away and rolling the tubes would be more efficient on the second boiler.

Q. By the extension of time from November 11th to December [839] 19th, or whatever the date was in December, was it possible for the plaintiff to develop a better sequence operation than it would have been had all of this work been demanded of him in the period of time encompassed in the provisions of the contract, that is, I believe including the modifications, November 15th?

A. I would say that the extension to December 19th had no connection with the boiler at all, because the drums, tubes and headers were all completed on October 27th, and the extension of time to December 19th would have no effect whatever on this sequence of operation.

Q. Calling your attention to paragraph 1-10, subdivision (b), on page 1-6 of the contract, which reads: "The subcontractor shall furnish sufficient forces, construction plant and equipment, and shall

(Testimony of William Edward Joslin.)

work such hours, including night shifts, overtime operations, and Sunday and holiday work as may be necessary to insure the prosecution of the work in accordance with the approved progress schedule. If, in the opinion of the constructor, the subconstructor falls behind the progress schedule, the subconstructor shall take such steps as may be necessary to improve his progress and the constructor may require him to increase the number of shifts, over-time operations, days of work, and/or the amount of construction plant, all without [840] additional cost to the constructor." That clause contemplates that if such extra time was demanded it would increase the cost burden on the plaintiff?

A. That is correct.

Q. In this instance did you demand that the plaintiff put on premium labor in order to complete this contract within the time specified by its terms?

A. No, sir; we did not.

Q. Why?

A. Well, I will be glad to explain that to your Honor: We had the highest respect for Mr. Borst, myself and all of my men. I complimented him when he left there. It was not my desire, nor the desire of any of my men to increase the cost to the Power Service Corporation by compelling them to put on premium labor. We would never have considered doing so. They were doing an excellent job, and we were satisfied, and the contracting officers were satisfied, and until such time as the contracting officer would call on us to force the Power Serv-

(Testimony of William Edward Joslin.)

ice Corporation to put on additional men, and to work premium labor on such days as it was called for, we would not do so.

Q. In this case you heard testimony that the contracting officer quite frequently visited that area and this building, as well as other items in the area that we were building. Now, [841] you say there was no demand by him to you to order that done?

A. There were several visits by the contracting officer, and he had a representative on the site. We frequently visited Power House No. 1, and they never once requested that we request Mr. Borst to put on premium labor.

Mr. Gibson: Mr. Watts has agreed with me that instead of writing all of these exhibits in the Reporter's Transcript, that the Reporter might make a notation that Exhibit so and so was received, and at this point was a part of the Reporter's Transcript.

The Court: I can tell you gentlemen now that I have just gone through one of these cases involving construction of one of these government plants. It was a case that took us a considerable time to try and it had a great number of exhibits like this one, and when I started to go over that transcript I found that it was much easier to have the exhibits copied into the record. I don't know whether you have ever tried digging out a particular exhibit from a great many others while you were trying to prepare a brief, or read a transcript.

Mr. Gibson: I was just thinking that it would

(Testimony of William Edward Joslin.)

be an unnecessary thing to do, to copy the exhibits two or three times in this one transcript, the same exhibit.

The Court: Of course, I can see your point, and [842] I think the Reporter will take care of that in the best manner possible. I do know this, however, that in reading a transcript if reference is made to an exhibit it would also be a bit inconvenient to try and find where it was copied in the transcript before.

Mr. Watts: Of course, we will have this done in any manner the Court would prefer.

Mr. Gibson: And that is our attitude.

The Court: I think you men need have no worry about this. If these exhibits are copied more than once in the transcript, I think you will find the additional cost will be a very minor amount.

Q. (Mr. Gibson, continuing:) Mr. Joslin, I believe that possibly it was after we adjourned, and it may not be a part of the record, but the Court asked you to check these charts for certain information. Will you state what the Court asked, that is, what his question to you was, and if you have the information requested?

A. Yes. The Court asked me to establish the list of items, such as were started prior to the progress schedule indication, and finished prior to the progress schedule date, [843] that is, the items that were started prior to the date as indicated on the chart, and finished prior to that date. On the piping system, which is segment one on the chart,

(Testimony of William Edward Joslin.)

Exhibit No. 64 I have now, and it would be the same on the one I had the other day when I was testifying, which I think was Exhibit No. 62—under segment one, item four, that was started prior to the progress scheduled time, and completed after the progress schedule. Item No. 5 under segment one was started prior to the time indicated on the progress schedule as starting time, and it was completed after the time indicated by the progress schedule. Item No. 6, which is the drain vent and trap piping, that was started before the progress schedule, and completed after.

Q. This line on the chart that indicates the proposed progress steps were the hatched lines?

A. That is right, and this line should have been continued out, this black line should have been completed.

Q. The cross-hatched lines show the percentage proposed to be completed at certain dates?

A. Yes.

Q. At the time they were to be completed with this work, what percentage of the work was actually completed?

A. In this instance about ninety-eight per cent.

Q. And what was to be the completion date?

A. Yes, sir; that is correct.

Q. And if the information shown on this chart was correct that line would have been extended out beyond the hatched line—I mean the black line would have been extended beyond?

A. The black line would have been extended out

(Testimony of William Edward Joslin.)

here (indicating). That would be the representation of the work completed; yes, sir.

Q. And Item No. 6 shows that it was started before the proposed date and completed after?

A. Yes, sir.

Q. And Item No. 7 shows that it was started before the scheduled date and completed after, that is, the control piping and special valves?

A. Yes, sir; and segment No. 2, pipe covering and insulation, the chart shows that was started before the scheduled date and completed after. On Boiler No. 1, which is segment three, item No. 2, the pulverizers, exhausts, burners, soot blowers, that item was started before the scheduled date and completed after. Item No. 4, boiler exterior casings, was started before the progress scheduled date and completed after. Item No. 5, ash and soot hoppers, was started before the progress scheduled date and completed after. Item No. 6, ash hopper lining, was started before the progress scheduled date and completed after. Item No. 7 was started before the progress [845] scheduled date and completed after, and that is listed as "induced and forced draft fans and drives." Item No. 8 under the same segment was started before, or prior to, the progress schedule and completed after. On Boiler No. 2, segment No. 4, item No. 2, air heater tubes, that item was started prior to the progress schedule and completed prior to the progress schedule. That is the only item that was completed prior to the progress schedule. Item three was started

(Testimony of William Edward Joslin.)

prior to the progress schedule, and completed after. Item No. 4 was started prior to the progress schedule and completed after. Item No. 5 was started prior to the progress schedule and completed after. Item No. 6 was started prior to the progress schedule and completed after. Item No. 7 was started prior to the progress schedule, and completed after. Item No. 8 was started prior to the progress schedule and completed after. Item No. 9 was started prior to the progress schedule and completed after. Under boiler No. 3, segment No. 5, item No. 4, which is the pulverizer, exhauster, burner, soot blower, that item was started prior to the progress schedule and completed after. Item No. 5 was started prior to the progress schedule and completed after. Item No. 6 was started prior to the progress schedule, and completed after. Item No. 8 was started prior to the progress schedule, and completed after. Under the auxiliary equipment, which is segment No. 6 on the [846] exhibit, Item No. 1 was started prior to the progress schedule and completed after. Item No. 3 was started prior to the progress schedule and completed after. Item No. 5 was started prior to the progress schedule and completed after. Item No. 6 was started prior to the progress schedule and completed after. I might explain on segment No. 3, which is Boiler No. 1, Item No. 8 was started prior to the progress schedule and deleted from the contract, and later it was reinstated before they completed the contract, but that was a separate contract by Hercules to the Dow Chemical Company.

(Testimony of William Edward Joslin.)

The Court: What relation did the starting of these different items which you have mentioned have with the water-wall tubes and headers? Would they be delayed on account of the water-wall tubes and headers?

A. Yes, sir; certain items would be. The brickwork, which would be Item No. 3 on boiler No. 1, indicated as segment No. 3, and the boiler casing, that is the exterior casing, which is item No. 4 under boiler No. 1, segment No. 3, Item No. 5, which is ash and soot hoppers; Item No. 6, under boiler No. 1, which is segment No. 3, ash hopper lining; on boiler No. 2, segment No. 4, item No. 4, the brickwork. Item No. 5, the boiler exterior casing; item No. 6, the ash and soot hoppers; Item No. 7, the ash hopper lining; on boiler No. 3, segment No. 5, Item No. 5, the brickwork; Item No. 6, [847] boiler exterior casing; Item No. 7, ash and soot hoppers, and possibly some on Item No. 9. It would be, however, a very little on Item No. 9, which is "hot and cold air and gas ducts."

The Court: How do you account for this work being started ahead of the production schedule, when naturally they would be delayed by the delay in the delivery of tubes?

A. On boiler No. 2 and boiler No. 3 they would have been delayed, but they had sufficient tubes for boiler No. 1. They had sufficient tubes to go along with boiler No. 1, and on boiler No. 2 and No. 3 they could have placed their men to doing what they could do up to the time that the boiler

(Testimony of William Edward Joslin.)

tubes had arrived, and the only men affected by that would be the boilermakers who do the setting of the drums, tubes and headers. They set the ash and soot hoppers. They set the casings. The boiler-maker at all times has sufficient work to keep him going. They kept their crew up until three days before the last tubes and headers were delivered to the job. They had just reached their peak crew on the boilers.

Q. (Mr. Gibson, continuing:) Now, Mr. Joslin, while you have this exhibit 64 there before you, does the record show that the explanation made was based on exhibit No. 64, which is the final construction schedule, and report, made by the plaintiff in this action?

Mr. Watts: None of these charts were made by the [848] plaintiff, but by the A-E-M.

Mr. Gibson: The data on these charts was compiled from the production percentages that the plaintiff reported in.

Mr. Watts: Yes, to Mr. Neubauer, who made the estimates. You understand, however, we are not questioning the accuracy of this schedule.

The Court: I had the thought in mind that there is some evidence here that there was a delay in completing the water-wall tubes and headers. Under your production chart, however, it shows that you completed some of the work ahead of schedule, so that necessarily it might follow that while you were delayed on the tubes and the headers you were able to go ahead with the other work.

(Testimony of William Edward Joslin.)

Mr. Watts: That is true, and the progress chart so shows.

Q. (Mr. Gibson, continuing:) I believe Mr. Borst made an explanation in the early stages of his testimony about the broken line and the black single pen line across page one, both of which start at the zero mark, extending up. Will you explain, Mr. Joslin, just very briefly, what those two sets of figures indicate, and what they are connected with. This is Exhibit No. 64, now.

A. Yes; this is Exhibit No. 64. The black solid line [849] represents the curve of the proposed progress of the installation, and it starts at zero percentage, that is, the percentages are marked on the left hand side, or the left hand two-thirds of the chart, probably the left hand one-third of the chart.

Q. Above what date does that start?

A. July 17th.

Q. And that is Exhibit No. 64?

A. Yes, sir; No. 64. And this (indicating) represents the percentage. The numbers above the date of July 5th—no; it is nearer above the date of July 10th; starting from the second black or dark line from the bottom of the page represents the percentages and goes from zero to one hundred.

Q. And that is represented by numbers of ten's, that is, ten, twenty, thirty, forty, fifty and so forth, to a hundred?

A. That is right. And the top line represents the overall of the various segments. The figures above the crosshatch represent the proposed completion at various dates.

(Testimony of William Edward Joslin.)

Q. For the entire job?

A. Yes, sir; the overall, and intersecting these lines are a point which represents the dates they propose to have a certain percentage completed. Above the cross hatch on the top line directly under the words "Power Service Corporation, Sub-contract No. 5-5, Completion of Power House No. 1—Now [850] where that intersects with the figure ten on the bottom line, **that represents the percentage of completion that they proposed, and that would be on August third.** They proposed to have ten per cent completed, and on this date over here (indicating), which would be September 13th, they proposed — or possibly on September 12th — these figures are rather small—no; it would be on September 13th—this is the intersection here (indicating). That point would represent the date on which they proposed to have fifty per cent completion, and with the other line—this one starting here, the dotted line, that shows the actual percentage, starting with July 17th it shows the actual percentage of completion as compared to the proposed completion. This line here (indicating), the dotted line, as compared to the other, or the proposed completion as of any particular date.

Q. Each little square this way represents one per cent?

A. Yes, sir.

Q. And each square, the other representing a date going this way (indicating)?

A. Yes, sir.

Q. So they would have completed one and seven-tenths per cent between these dates?

(Testimony of William Edward Joslin.)

A. No, sir; from this date where the line intersects across here (indicating), that would be ninety-six per cent [851] completed, which would be on November 27th, and on December 19th they had completed four per cent, between those dates.

Q. According to that schedule, how long did it take to complete the last one per cent?

A. On this date, November 7th, they were ninety-nine per cent complete—I should have said December 7th, not November 7th—between then and December 19th they completed one per cent.

Q. Will you state if there was any question of absence of materials in doing any work on the tubes—does the chart show that they were up to schedule?

A. On August 19th they proposed to be sixteen per cent complete—no; not sixteen, I should say twenty-six per cent complete, but they actually were $20\frac{1}{4}$ per cent complete on that date.

Q. At that time there was some complaint that they were delayed, but to the third and eighth of August the findings of fact says they could not have used the tubes if they had them. Now, will you tell us what per cent they were complete by the eighth?

A. They proposed to be 14 per cent complete, and they actually were ten per cent.

Q. And how much on the 28th of August?

A. They proposed to be 37 per cent complete, and they [852] actually were thirty per cent complete, and on the 26th of October, the date that the last—

(Testimony of William Edward Joslin.)

Q. (Interposing:) Does that show the 26th, or the 28th?

A. On the 28th of October when the last drums, tubes and water-wall headers were completed, they were at that time eleven per cent behind schedule. That is on the date the last drums, tubes and water-wall headers were in place. That is indicated by the intersecting of the percentages at the left over here (indicating), with this pen line, and at the top of the chart that represents the percentage completed at any particular date shown at the bottom of the chart. Here (indicating) it shows what is the proposed percentage of completion, and on this line the actual percentage of completion.

Q. And that is also indicated by this dotted line. All proposed percentages are designated at the top of the over-all heavy black line?

A. And is reflected on this line (indicating).

Q. Indicating a certain point at which certain percentages will be completed, while the dotted line shows the actual daily status of the job?

A. That is right.

Q. Was Power House No. 1 equipped with electric lighting facilities which would permit night work.

A. Yes, sir. [853]

Q. Was one hundred and twenty days a reasonable time within which to perform the proposed contract that the Power Service Corporation has under litigation here?

A. I would say it was a reasonable time.

Q. Is there a difference between the term "se-

(Testimony of William Edward Joslin.)

quence of operation," as applied to the erection of a single unit, and "sequence of operation," as applied to a duplicate operation, or applied to two or more units of the same character?

A. I think I have explained that before.

The Court: I think that is right, and explained it very well.

Q. (Mr. Gibson, continuing:) In the findings of fact reference is made to delay in replacing two water-wall tubes, and the cost of these items—did you ascertain the cost of those two headers that were delayed, or the cause of delay?

A. Yes, sir; the cost was \$810.00.

Q. Both of the headers?

A. Yes; for both of the headers.

Q. Under what date did the Power Service Corporation acknowledge receipt of Notice to Proceed under the contract, which is the subject of this litigation?

Mr. Watts: I introduced that in evidence. It was on July 13th.

A. Yes; I think that is right, July 13th, 1944.

Q. Were progress payments to the Power Service Corporation held up, and if so, for what period?

A. On the Government contract all progress payments are held up until such time as satisfactory bonds have been submitted and approved by the contracting officer on any contract; until such time as these bonds are submitted and approved no

(Testimony of William Edward Joslin.)

payments are made, and no payment was made to the Power Service Corporation.

Q. And what was the reason for holding this up?

A. They were held up pending the approval of the bonds and the signing of the contract.

Q. Did the Power Service Corporation pay any money, or other thing of value, or agree to pay any money or other thing of value, as a consideration for the addition of the clause which it added to the bottom of the signature page of the formal subcontract?

A. That would be impossible for me to answer. I know they didn't pay anything to me.

Q. I am asking about you, Mr. Joslin?

A. They paid nothing to me.

Q. The Power Service Corporation, did they render any additional service or agree to render any additional service beyond what was required to be rendered by them under the general specifications as a consideration of the clause added [855] by it to the signature page of the contract?

A. That is the same question. Not between they and I; no, sir; there was none.

Q. Did the Power Service Corporation suffer any detriment or agree to suffer any detriment as a consideration for the addition of the clause which they had added to the form of the contract on the signature page at the bottom?

A. Not to my knowledge.

Q. Assuming, Mr. Joslin, that the Power Serv-

(Testimony of William Edward Joslin.)

ice Corporation learned about July 14th, 1944, that some of the water-wall tubes required for the completion of its contract were missing, and assuming that these tubes were believed by the Power Service Corporation to be important to their completion of the contract and the construction of this power house, how long should it have reasonably taken the Power Service Corporation to determine and prepare a list of the number of missing tubes, and make a requisition for them?

A. With a sufficient number of men they should have been able to determine the missing tubes within a week's time.

Q. How many tubes would they have to count to determine the missing number?

A. Approximately seven hundred fourteen.

Q. What would have been a reasonable time within which to complete the inventory required by Section 5-04 of the [856] specifications?

A. Well, we made an estimate prior to the letting of this contract, and we figured we could have prepared an inventory of everything in the power house within three weeks.

Q. Then three weeks is the answer?

A. Yes, sir.

Q. Was the inventory prepared by the Power Service Corporation by September 9th, 1944?

A. No, sir.

Q. What were "punch" lists, as that term is used in connection with construction work?

(Testimony of William Edward Joslin.)

A. Punch list is a misnomer. They are actually deficiency lists.

Q. What purpose do they serve?

A. When a segment of work is presumed to be completed it is reported to the inspecting force, the engineers of the A-E-M, and they send their engineer to make a final inspection of that work, which has been listed as ready for inspection, and any defects in material, or improper installation, or omissions, are noted, and they are placed on what is known as a "punch list," and presented for correction, to the particular contractor.

Q. And the contractor is required to rectify the errors within the terms of the contract? [857]

A. On the work within the contract he is supposed to rectify it at his own expense, for which time is automatically allowed. We just finished a job out at Mare Island for the Navy, and we had some boiler feed pumps, and we called for an inspection. Under the actual test the casing busted. We were fourteen months getting the casing, but the job was actually completed as of the date of inspection, and then we were automatically granted the extension until we got the casing.

Q. The contract was completed except for that item?

A. That is correct. The item which I had to replace at my own expense.

Q. What is your understanding of the term, "nearly all," as used in paragraph 5-04, subdivision (c) of the specifications?

(Testimony of William Edward Joslin.)

A. The term "nearly all" means just what it says in the findings of fact.

Q. Is that your interpretation? A. Yes.

Q. Mr. Borst stated that he interpreted it as meaning merely minor items. Have you any reason to disagree with that statement?

A. Definitely, I have. The minor items he states as bolts, nuts, gaskets, and so on. If those were the only items missing, there would have been no need to mention them [858] in the specifications. They could have been gotten at any time. We have those, all the bolts, gaskets, piping, flanges, nuts and so on that you can count. We had the facilities for the manufacture of our own flanges.

Q. According to the statement—I think it was of Mr. Borst—there was some question as to the use of equipment and shifting it from boiler to boiler as the work progressed under their progress schedule indicating simultaneous work on three boilers. Did they have enough equipment to complete this job under simultaneous construction?

A. No; they did not, not to operate on all phases of the boiler work on boilers one, two and three at the same time. They did not have sufficient equipment to operate in that manner.

Q. Under the terms of their contract they were to supply adequate equipment to take care of the contract?

A. They did supply equipment. Tube rolling operation requires a minimum of equipment. You have a hoist, but you have most of the tubes raised

(Testimony of William Edward Joslin.)

by hand blocks. They had the necessary equipment. These tubes are only twelve feet apart.

Q. Was there any shortage of equipment by the Power Service Corporation in connection with the performance of their contract?

A. No; I would not say that, but they didn't have sufficient equipment to operate on all three boilers without shifting the [859] equipment, and that would have to be done even at twelve feet between. I would not say they had a shortage of equipment, however, because they didn't.

Q. Was it necessary for them to use rented equipment after the tenth of November on that job, assuming that they were delayed so they didn't complete until December, under what you have explained as a contract that could have been performed before November 15th, and also taking Mr. Borst's list of machinery which he says was there in the last thirty-nine days? Was there any need for this rented equipment?

A. The boiler—the last boiler tubes and headers were completed on October 27th. That was actually completed. Now, there was no occasion to keep any tube rolling equipment beyond that date. If they had equipment for other items which were still incomplete that would have to be rented, I presume, until they were completed. My contention is that if they had followed their progress schedule and maintained their progress schedule, they could have completed all of the work before November 15th.

Q. Considering the status of the job as of No-

(Testimony of William Edward Joslin.)

vember 10th, was it necessary to keep the rented equipment beyond that date?

A. It was necessary to retain any equipment other than that required for rolling tubes, or installing the headers.

Q. Do you know what a Model "A" Beaver Pipe & Bolt Machine is? [860]

A. Yes, sir.

Q. What would be the normal life of a machine of that type?

A. On equipment of that kind and type, the maximum depreciation allowed is twenty per cent, which would establish a depreciation period of five years.

Q. In your experience with machines of this type, would it have a normal life of five years?

A. That would require the replacement of dies, but the normal life would be, I would say, about ten years.

Q. Do you know what Blackhawk Pipe Benders are? A. Yes, sir.

Q. Do you have any knowledge of the normal life of that type of machine?

A. Indefinite, you might say, with the exception of replacing dies.

Q. What would be the normal life of a Lincoln Welding Machine?

A. You are permitted to write off a machine of that kind in five years as depreciation, but the machine should be in good shape at the end of five years.

(Testimony of William Edward Joslin.)

Q. Do you know what a Yale Spur Gear Chain Hoist is? A. Yes, sir.

Q. Do you know the normal life, normal life usefulness of that article? [861]

A. About twenty years.

Q. Does that apply whether it is a one-ton or a one and a half ton?

A. There is no difference.

Q. You assume, of course, that it is used for the purpose for which it was intended? You assume that? A. That is correct.

Q. Would that apply also to a one and a half ton gear chain hoist? A. That is right.

Q. Do you know what a Black & Decker Portable Grinder is? A. Yes, sir.

Q. What would be the life expectancy of that machine?

A. Five years is the normal allowance.

Q. And would it be usable in that period of time? A. Yes, sir; in excess of that.

Q. And on hydraulic jacks, is there a life expectancy on those machines?

A. We have used them for twenty years.

Q. Then the normal life expectancy would be at least five years? A. Yes, sir.

Q. Mr. Joslin, who was Ralph Jung?

A. He was my boiler superintendent. [862]

Q. Was he authorized to represent you as agent, or bind you by any opinion, or commitment?

A. No, sir; he was not.

Q. Who was the one at the Sunflower project

(Testimony of William Edward Joslin.)

in Kansas City, Kansas, who was authorized to represent you, not only who they were, but also to what extent they were authorized to bind you in any manner?

A. Mr. Wedlick, during his stay, and Mr.—I think that was from January, 1944 until the middle of August, but I have forgotten the date. It was in 1944.

Q. It was around December?

A. Well, possibly so; and after that Mr. Carl Vasicek replaced Mr. Wedlick with full power of attorney. Those were the only two representatives appointed by me to represent and to sign in my behalf.

Q. Now then, as to the full power of attorney, Mr. Vasicek and Mr. Wedlick were under your direction, they were authorized with full power of attorney for what purposes?

A. So far as signing change orders, agreeing to prices, approving contracts, but not the payment of any checks.

Q. That was primarily with the A-E-M?

A. As my representatives to handle any emergency that might arise on that project, with the exception of signing checks.

Q. Was that a requirement of the A-E-M, on the project? [863]

A. A requirement of the contract was that either I myself had to be there, or some duly appointed representative with power to act in my behalf during the life of my contract.

(Testimony of William Edward Joslin.)

Q. And that applied to any other contractor directly or indirectly under the A.-E.-M.?

A. That applied to any contract, a fixed fee contract, or a lump sum contract.

Q. Were any of those names which have been brought in, or mentioned here,—in the interest of saving time, Mr. Joslin, I will ask you this: Were there any other names except Mr. Wedlick and Mr. Vasicek authorized, or appointed, as your representative, or authorized to represent you in any manner?

A. Nobody except Mr. Wedlick and Mr. Vasicek were authorized to represent me in any manner whatever, as to binding me in any way.

Mr. Gibson: I believe that is all.

The Court: There was something said about suspending this project at one time,—were you there at that time, Mr. Joslin?

A. You mean when you say “suspending this project,” Power House No. 1?

The Court: Any part of it? Were you engaged at a time when any part of its was suspended?

A. Various segments of the Hercules Power Plant at Sunflower [864] was suspended at various times. Some of them were suspended in my absence.

The Court: I don't think that your contract is in evidence. Did the Government reserve the right to suspend construction?

A. Yes, sir.

The Court: What would have been the result

(Testimony of William Edward Joslin.)

if they suspended the construction on this Power House No. 1?

A. They did suspend construction on Power House No. 1 at which time if we had made a previous estimate of the work involved a credit would be given for that amount of work done.

The Court: What, if they had determined after you entered into this contract with the plaintiff that they would suspend the construction,—what position would that place you in with the Power Service Corporation?

A. I would have had to pay them up to the time and the amount of work done at that time.

Mr. Gibson: I think there is a clause covering that, as to the minimum work done and the adjusted payment in the event of suspension.

The Court: If there was any material missing, was there any authority to suspend work because of that?

A. Yes; there was a clause in the contract that we can suspend the operation on this project at any time there was an insufficient amount of material available, or insufficient [865] manpower, or any reason that might happen due to the shortage of material. We had the authority to suspend operation on the project; yes, sir.

Mr. Gibson: Were you talking about the project, or the power house?

A. The power house.

The Court: I was thinking about this defendant's relation to the Power Service Corporation,—

(Testimony of William Edward Joslin.)

if the Government could suspend the work what position that would leave this defendant in with the Power Service Corporation, whether he could suspend work.

Mr. Gibson: I think that followed right along.

The Court: The question of his contract is not before the Court. If the Government could suspend work for ten days, could they suspend that work for that period and require you to go ahead?

A. We could suspend for ten days with the approval of the contracting officer.

The Court: Could they suspend without that approval?

A. Yes, sir; they had that authority.

The Court: I believe that is all.

Cross Examination

By Mr. Watts:

The Court: Before you start on your cross examination [866] we will recess for fifteen minutes.

March 31st, 1944, 11:15 a.m.

The Witness (Mr. Joslin): May I say, your Honor, I was under the impression in answering the question, I was considering what would be the procedure, how the Government ordered suspension of operations on power house No. 1. That is in the specifications repeatedly.

The Court: There is nothing in your original contract?

A. Yes; in my original contract.

Mr. Gibson: And that is bound into this contract?

(Testimony of William Edward Joslin.)

A. Yes.

Mr. Gibson: That is all.

Cross Examination

By Mr. Watts:

Q. Were you at the site of the Sunflower when Mr. Joslin came down to bid on this contract,—I mean when Mr. Borst came down to bid on the contract? A. No, sir; I was not.

Q. Were you there on July 11th, 12th or 13th when he commenced performance of this contract?

A. No; I was not.

Q. You were there some time in August, in the early [867] part of August? A. Yes, sir.

Q. Can you give approximately the dates when you were there?

A. I arrived there, to the best of my memory,—it was approximately August 8th. I was there up to,—well, I would say approximately the 25th of August, less the time I spent at Minneapolis.

Q. How long were you at Minneapolis?

A. I think it was three days.

Q. When were you next at the site?

A. I think it was in December.

Q. What date? Can you place it with reference to some other time, maybe?

A. I shook hands with Mr. Borst the date he left there.

Q. On December 19th?

A. I was there at that time.

Q. How long had you been there?

(Testimony of William Edward Joslin.)

A. I had been there at that time anywhere from one to two weeks.

Q. Between seven and fourteen days?

A. Approximately; yes, sir.

Q. When did Mr. Wedlick leave?

A. Without checking the records, I would not know. [868]

Q. Mr. Wedlick left before Mr. Borst did?

A. Yes; he left before Borst.

Q. Those were the only times that you were on this job?

A. I suppose that you mean during this contract?

Q. Yes.

A. That I would have to check.

Q. Those are the only times that you can recall, —I will put it that way?

A. At this time it is; yes. If Mr. Wedlick left at a different time then I was there when Mr. Wedlick left. I replaced Mr. Wedlick with Mr. Vasicek.

Q. Mr. Vasicek had been there all of the time?

A. Yes.

Q. Will you tell the Court whether you ever talked to Mr. Borst after he started to work, or from the time he started to work until the date that he left? A. No, sir; I didn't.

Q. Will you tell the Court how many times during the time that he was there from July 11th until December 19th that you went down to Power House No. 1 and made an inspection of the progress of this work?

(Testimony of William Edward Joslin.)

A. That was not my responsibility. I used to make field inspections around the entire area with the various superintendents at which times I received their diary and reports. [869]

Q. Did you, or did you not, go down to the site of Power House No. 1 during the time Mr. Borst was there performing this contract?

A. I went there, not as an inspection, not on that basis, and not on the basis of making any determination of the work. I visited the power house along with every other site on the project. We made no report on the power house.

Q. You didn't see Mr. Borst on this visit?

A. No, sir.

Q. The only time you talked to him was when you told him goodbye and at the time you were there to relieve Mr. Wedlick?

A. That is the only time I remember talking to him, when I told him goodbye.

Q. You had nothing to do with the preparation of the specifications on this contract did you?

A. I had nothing to do with the preparation of any contracts or any specifications that were supplied to me by the Government or the A.-E.-M.

Q. None of your employees had anything to do with the preparation of the specifications, did they?

A. None of my employees would have anything to do with this, or with any other, specifications supplied by the Government or the A.-E.-M.

Q. You yourself didn't call for the bids on this contract?

A. No, sir. [870]

(Testimony of William Edward Joslin.)

Q. Nor any of your employees or representatives? They did not call for bids on this contract, did they?

A. I don't know whether they personally called for them. The bids would have to be submitted to us as the contractor on this contract. Whether we mailed the requests for bids, I do not know.

Q. The question was: Did you call for any of the bids yourself? A. I personally did not.

Q. Nor any of your representatives?

A. I would not know whether it was our representatives that called for the bids, or not.

Q. Did you select the successful bidder on this contract, or was that by the contracting officer?

A. That was by the contracting officer at our recommendation, that the contract be awarded to the Power Service Corporation.

Q. Now, Mr. Joslin, did you have anything to do with the typing or the preparation of the formal contract that was subsequently entered into by yourself and the Power Service Corporation?

A. We had nothing to do with the typing of the contract.

Q. It was prepared in whose office? [871]

A. I would not know in whose office it was prepared. It probably was written up in Murphy's office.

Q. In fact, it was written up in his office and mailed out by him for signature?

A. Probably so.

Q. Did you yourself, or any representative of

(Testimony of William Edward Joslin.)

yours, have anything to do with the preparation of any of the three modifications, Modification No. 1, No. 2 or No. 3? A. Yes, sir.

Q. Did you prepare these modifications?

A. After the original was prepared by the Power Service Corporation.

Q. How was that?

A. The original of the modification was prepared by the Power Service Corporation.

Q. You mean this clause on the signature page of the contract?

A. No; I am speaking of the items that went to make up the modifications. That was originally submitted by the Power Service Corporation. It was recommended verbally by ourselves, and approved by the contracting officer, and later incorporated into a unit known as Modifications No. 1, No. 2 and No. 3.

Q. And later these proposed modifications, they were actually prepared by the A.-E.-M. engineering office? [872]

A. Those were, from the estimate submitted by the Power Service Corporation.

Q. I think you testified yesterday, Mr. Joslin, that when the matter of resuming operation on Power House No. 1 first came up in June of 1944 that you were very much opposed to anyone else handling that contract other than your own organization? A. That is correct.

Q. You tried to get the government to let you

(Testimony of William Edward Joslin.)

handle this contract before they called for bids; that is true?

A. That is not quite true. We were instructed to proceed with this contract prior to the Government or ourselves calling for bids. We were instructed to proceed with the completion of this contract, after which I was notified by long distance telephone that they desired to sublet it out, at which time I was opposed to subletting it.

Q. You were opposed to anyone performing this other than your own organization before the bids were called for?

A. Before the specifications were completed; yes.

Q. After the bids were accepted and after the performance started on the work you tried to get the Government to cancel this contract and let you complete this work? A. That is true.

Q. On August 12th, which was within a month after the [873] award was made, you wrote a letter to the Project Manager, Mr. Duekelow, when they requested that clause be inserted to protect them against delay, you urged at that time,—I will just read it here, this last paragraph: "We appreciate their position, but are opposed to incorporating their dictated paragraph on the signed sheet of their contract." A. That is correct.

Q. What did you mean when you said, "We appreciate their position?"

A. I meant that it was possible that the time would be extended, which we had no objection to, but their proposal as dictated did not request time extension only.

(Testimony of William Edward Joslin.)

Q. On the same date you knew that claims for damages would subsequently be presented by the Power Service Corporation if the contract was to be carried forward by them?

A. No, sir; I did not know that claims would subsequently be presented. I did know on checking through my files, and the files of this contract, which it was one of my duties to check back through the work and the progress of the work,—both our own work and this work, which was under our direction, at which time I discovered the application from the Power Service Corporation stating that they had an estimated cost of approximately \$41,000.00.

Q. For how many days delay? [874]

A. I would not know the number of days, but I remember the approximate amount of money.

Q. Suppose you look at the letter of August 3rd, which is Exhibit No. 7?

A. Yes, sir; I have it here. It reads: "The following analysis of time extension is as presented verbally to yourself and the Area Engineer today.

"Basis of Time Extension. Boiler No. 1,—

Q. (Interposing:) That is dated August 3rd, and is addressed to Cory, Joslin & Macnsons, and signed by W. L. Borst, Chief Engineer.

A. Yes, sir; that is right.

Q. Now, go ahead.

A. "Basis of Time Extension. Boiler No. 1, water-wall tubes required August 1st, 1944, water-wall tubes scheduled delivery, August 22nd, delay three weeks.

(Testimony of William Edward Joslin.)

“Boiler No. 2. Water-wall tubes required August 8th, 1944. Water-wall tubes scheduled delivery September 29th. Delay seven weeks.

“Boiler No. 3. Water-wall tubes required August 15th. Water-wall tubes scheduled delivery September 29th. Delay six weeks.

“Hypothesis for estimate of cost for six weeks delay in completion,— [875]

Q. (Interposing:) In other words, on August 3rd upon receipt of that letter you knew from that time forward, and you anticipated that there would be a delay of forty-two days, and, second, you knew that there would be submitted a claim for damages?

A. No, sir; I did not know on August third. In fact, I knew by August 12th of that letter. I knew on August 12th, in which I in no way agreed that it was correct. That was my reason for not believing it to be correct, and that was my sole reason for writing and suggesting that the Government cancel that contract.

Q. Now, reading from Exhibit No. 10-A, which is dated August 12th: “Gentlemen:”—and this is for Mr. A. A. Dukelow: “We note in our files the request of the Power Service Corporation for additional fee in the amount of \$41,382.00 claim for delays because of material shortages. It is the belief of the writer that material shortages will develop throughout the life of the Power Service Corporation’s contract, and these shortages will remain a constant source of controversy of claims filed by the Power Service Corporation.

(Testimony of William Edward Joslin.)

“We believe that it would be to the benefit of the Government and all parties concerned if legal steps were taken to compensate the Power Service Corporation for costs expended, together with a reasonable profit allowable by the Government, and cancel their contract, and complete Power House No. 1 with our [876] own forces. By so doing we will avoid possible future claims and litigation that might develop should this contract remain in force.”

A. That is my letter and expresses my opinion exactly as of that date.

Q. Four days later than August 12th, to-wit: On August 16th, 1944, you had lunch with Mr. Fegles in Minneapolis?

A. About that time. I don't remember the date.

Q. Did you on that date discuss a possible change in the form of the contract with Mr. Fegles?

A. I discussed the matter with Mr. Fegles. When I was introduced to him at the Twin City Ordnance Plant by Colonel Taylor, he said, “I want you to meet the contractor for whom you are sub-contracting at Sunflower.” Mr. Fegles said, “I would like to amend that contract,—

Q. (Interposing:) Is that all of the conversation?

A. I said, “So far as I am concerned, I am sorry, but the contract will have to stand as written.”

Q. Did you tell Mr. Fegles that you agreed with him on August 16th that the position of the Power Service Corporation should be made clear before the contract was signed?

(Testimony of William Edward Joslin.)

A. I don't remember any such statement as that.

Q. Did you discuss with him at that time about the possibility of writing for a construction from the A.-E.-M., or the Government, of paragraph 1-05 (e) of the specifications? [877]

A. I remember no further discussion about this contract with Mr. Fegles, other than the original statement.

Q. Let me ask you if this letter of August 22nd, which is Exhibit No. 16, is not in fact a direct outgrowth of this conversation that you had with Mr. Fegles on August 16th, the letter being dated August 22nd?

A. No. I believe this letter is an outgrowth of one previously written, to which we refused to approve, and not a direct result of the conversation with Mr. Fegles.

Q. Then by that you mean that Exhibit No. 9,—please refer to exhibit No. 9.

A. Yes; I have it.

Q. In other words, under exhibit No. 9, which is Plaintiff's letter to you dated August 8th, 1944, they had requested that the clause be appended to the signature page, and you had replied that you were opposed to that clause. Now that is the reason why the letter of August 22nd was written asking for a construction by the A.-E.-M., and by you and the contracting officer, of clause 1-05 (e) of the specifications?

A. I say, it is my opinion that this second letter of August 22nd, Exhibit No. 16, I believe, and it

(Testimony of William Edward Joslin.)

is my opinion, that this letter is the result of the refusal to accept exhibit No. 9, and not a direct result of a conversation with Mr. Fegles. [878]

Q. Now, may I have your Exhibit "M"?

A. Yes.

Q. After this letter of August 22nd, in which they ask for a construction, or for an interpretation, of the contract, then a letter was written you by Mr. Wedlick, and later a letter written to Mr. Wedlick refusing to give construction of the contract, but you gave some personal instructions to Mr. Wedlick about making any change in the contract?

A. I don't know the date that I gave Mr. Wedlick the instructions, but I do remember the instructions.

Q. I hand you Exhibit "M", which is dated August 26th?

A. That is correct. Mr. Wedlick, I believe, sent me a photostatic copy, or a made copy, to which I replied.

Q. And in that letter you wrote as follows,—I am reading the second paragraph: "I am not familiar with the legal phases involved, but I am sure that we must insist that the terms of the contract be met, and any consideration for additional costs and extension of time must be submitted direct to others than ourselves for approval. This, of course, will be separate and not a part of the contract which must be signed as is." That is signed by yourself, Mr. Joslin?

A. Yes, sir.

(Testimony of William Edward Joslin.)

Q. Now, what do you mean in that letter when you say, "It must be submitted direct to others than ourselves for approval?" [879]

A. We would not have authority to approve any appendages to the contract proper, unless,—

Q. (Interposing:) Unless what?

A. We would have no authority to approve any appendage to the contract. We would submit any proposition presented by the Power Service Corporation up to the contracting officer through the A.-E.-M., for a final decision, and the contracting officer, on behalf of the Government, would direct us to follow any procedure, and we would, according to the general terms of our contract, comply with the directive issued by the contracting officer.

Q. Wasn't this idea of a special clause, in fact, taken up with the A.-E.-M., and the contracting officer?

A. I don't know. I was not there at that time.

Q. You were not there when any of these negotiations were carried on, were you?

A. I was there during the negotiations of the first clause submitted. I think it was Exhibit No. 9. When that was transmitted, I was there at that time, but I was not there on the 22nd of August. I was not there during the time following the negotiations.

Q. You had no objections to a change in the original form of the contract, if the contracting officer and the A.-E.-M., first approved it?

A. Yes; I did. In fact, I stated to Mr. Hagan

(Testimony of William Edward Joslin.)

in his office [880] at Sunflower, prior to my leaving, that we would not be a party to anything that altered the language of that contract in any shape or form. I was very explicit, so Mr. Hagan understood what I meant.

Q. When did you first learn that a special clause had been appended to the contract? Before it was executed?

A. When Mr. Wedlick phoned me that the final clause which was finally added to the signature page of the contract,—he phoned me about it, and I asked if it in any way changed the language of the contract, and he advised me that he had taken it up with Mr. Dergance and Mr. Dergance stated that it only reiterated the rights granted the Power Service Corporation under the contract, and in no way changed the contract.

Q. Did you make any further investigation of your rights and liabilities under that special clause before November 10th?

A. I don't remember the date. The only reference I had about it later was during the visit to the Sunflower Ordnance Plant I remember I again questioned Mr. Dergance as to this clause.

Q. When did you question Mr. Dergance? Was that in December?

A. It was during my next trip. I don't remember the date.

Q. I believe you stated that it was in December?

A. Yes; I think so.

Q. That was at the time the plaintiff had completed its contract?

(Testimony of William Edward Joslin.)

A. So far as I know, that is correct.

Q. At any time from the time this contract was executed by your project manager, Mr. Wedlick, up until the present time, have you ever protested to the plaintiff that this signature was not authorized to the contract? A. Not to my knowledge.

Q. Have you ever made any protest to the plaintiff about the inclusion of this special clause to the contract before it was signed?

A. Not to my knowledge.

Q. Now, what requirement, if any, did you impose upon a bidder with respect to making an inventory of the materials at the site before bids were submitted? A. I made no requirement.

Q. Was there any requirement made by the specifications, for example, about a complete inventory be made before a bid was submitted?

A. The specifications were written so as to permit an inventory being made, but I would not in any way state that an inventory was necessary to properly prepare a bid on this contract. [882]

Q. As a matter of fact, it was not necessary to make a complete inventory before the bid was submitted?

A. To me it was not necessary. It was possible, but it was not necessary to make an inventory of all of that material in order to properly prepare a bid on that contract.

Q. But it was necessary, according to the contract itself, as soon as the award was made on the bid for the successful bidder to do two things; first,

(Testimony of William Edward Joslin.)

to make up a material list, and subsequently make up a field inventory and check that against the material list?

A. Well, I think the term is expressed,—I think the real intent of the contract is expressed in it, and that was done so that a complete material list should be made from the plans, and then checked against a physical inventory at the site, because that is the only way you could coordinate the two.

Q. What is the meaning of that part of Section 5-04 (b) of the specifications which reads: "Such an inventory will be kept current by the subcontractor during the progress of the work, and the subcontractor will be held responsible for advising the constructor of his requirements sufficiently in advance of the time such items will be required to enable procurement without delaying progress?"

A. It means just what it says.

Q. It means that the field inventory will be checked [883] against the material list during the performance of the contract so as to ascertain at all times the shortages in time for them to be requisitioned to meet the construction schedule?

A. Not necessarily.

Q. What does it mean?

A. Well, it could mean, and very probably did mean, to keep them current at all times, and the meaning is that they would add to that inventory any material that would have been delivered to them from a requisition previously issued, and to keep the inventory current at all times.

(Testimony of William Edward Joslin.)

Q. You have full access to your records in connection with this contract?

A. Yes; I have access to them, but please don't ask me to find them.

Q. Do you have a single instance recorded in your correspondence where you made any complaint against Mr. Borst or his company about the manner in which he prepared the material lists, or the field inventory?

A. Yes; we have. I think we have a letter of transmittal, or a copy of a letter, received from Mr. Hagan, and I think it was transmitted through our office, complaining about the inventory.

Q. Did you or any representative of your company ever [886] make any complaint to the Power Service Corporation about their failure to make the inventory on time?

A. Not to my knowledge, and as a personal matter I didn't.

Q. You didn't know of any of your employees making such a complaint?

A. The only reference I have of a complaint is on a labor report in our files which said that Mr. Borst promised to try and secure more men. That is a notation by one of our foremen. That is the only complaint I know of.

Q. You haven't introduced that record?

A. No, I don't know whether it is signed. It is a carbon copy, and in pencil. I have it in my brief case.

Q. After the plaintiff started the performance

(Testimony of William Edward Joslin.)

of that contract you expected them to complete in the one hundred and twenty days? A. I did.

Q. And you expected to deliver to them the materials at times and in quantities required sufficient to enable them to commence their work according to their schedule, and to finish it according to their schedule? A. Not necessarily.

Q. You reserved to yourself the right to furnish materials to them whenever you wished to do so, regardless of the time [887] provided for in their schedules?

A. No; it was our intention, and I believe we did furnish them materials at the earliest possible time after being notified by the Power Service Corporation that any such materials would be needed, regardless of the date of starting, or the progress schedule.

Q. I asked if you had access to your own records, and you said that you did. Now, I will ask you, Mr. Joslin, if you have ever requested, or asked, the Hercules or the Combustion people for any of their records in connection with this trial?

A. No; we never made application to them for any of their records.

Q. What is the difference between boiler tubes and water-wall tubes?

A. Water-wall tubes are the tubes that go around the outside of the boiler on the furnace side of the brickwork. They are used for heat retention. The fins are on there to secure additional heating surface. The boiler tubes are installed inside of the boiler.

(Testimony of William Edward Joslin.)

Q. The thing we are concerned with here is the two hundred and twenty-four boiler tubes?

A. That is right.

Q. You didn't know that these were missing when the specifications were turned over to the Power Service Corporation [888] to bid upon?

A. I don't know that I made such a statement, but I didn't know that they were or were not.

Q. And the same thing is true at the time that the bid was accepted,—you didn't know they were or were not there?

A. I didn't know of the presence or the absence of any particular material.

Q. You do know that Mr. Wedlick learned that these two hundred and twenty-four tubes were missing on July 14th? A. No; I didn't learn that.

Q. Did you learn that Mr. Wedlick knew that the water-wall tubes were missing on July 14th?

A. I don't know that Mr. Wedlick learned that these tubes, or any tubes, other than the general information that there were some missing tubes, which information, I presume, was submitted to him on July 14th. I don't know about that.

Q. Had you learned that Mr. Wedlick knew those were missing on July 26th, the date of the plaintiff's letter, which is Plaintiff's Exhibit No. 4?

A. I believe,—may I look at that Exhibit No. 4,—I believe that Mr. Wedlick was informed that the water-wall tubes for all three of the boilers were missing on July 26th.

Q. And if all of the water-wall tubes were miss-

(Testimony of William Edward Joslin.)

ing [889] for all three of the boilers that would mean two hundred and twenty-four tubes?

A. That would mean seven hundred and fourteen tubes.

Q. Now, each one of these water-wall tubes that were missing has a particular and different designation and description?

A. That is correct.

Q. On this letter of August 19th, 1944, you were given confirmation of the list of those that were missing?

A. Those were represented at that time to be,—

Q. (Interposing): I believe that is Exhibit No. 20.

A. It is represented as furnace tubes and not as water-wall tubes. I am not saying that those particular tubes were not water-wall tubes, but I say that the requisition specified them as furnace tubes, which we assumed to be correct.

Q. Now then, Mr. Joslin, when you received this notation when Mr. Wedlick learned that these water-wall tubes were missing, did you or he take any steps to requisition them from the manufacturer?

Mr. Gibson: I think that question implies something that is not in the record. He says in this question, "When these water-wall tubes were missing," or "when you learned that the water-wall tubes were missing," and it simply says in this letter, or notification, "tubes." [980]

The Court: There isn't any question but what

(Testimony of William Edward Joslin.)

the tubes were missing. I don't remember whether there was any connection with Mr. Wedlick on this matter or not. I think he may answer.

A. I don't know whether Mr. Wedlick contacted the Hercules or the Combustion people about the water-wall tubes.

Q. The simple question I want you to answer, Mr. Joslin, is: Did you, or did you not, requisition these tubes on or about July 14th when you learned that they were missing?

A. We didn't requisition any material from the Hercules until such time as we received a request to do so by the Power Service Corporation.

Q. Did you on July 26th requisition these from the Hercules people?

A. We didn't until we received a requisition from the Power Service Corporation.

Q. Did you requisition them on July 19th,—August 19th, I mean? A. No, sir.

The Court: We will recess at this time, and I think we will convene at one thirty, if you gentlemen will meet me at one thirty.

March 31st, 1947, 1:30 p.m. [891]

Q. (Mr. Watts, continuing): At the recess, Mr. Joslin, we were inquiring about the requisition on the two hundred twenty-four water-wall tubes found to be missing. You did not issue any requisition yourself when you received the plaintiff's letter of July 26th, 1944, did you?

A. It was not our place to issue requisitions. It was the Power Service Corporation who issued the

(Testimony of William Edward Joslin.)

requisition. The procedure was this: When the Power Service Corporation would issue a requisition, they would specify what material they wanted, and we took it direct to Hercules and see if that material was on purchase, or if it was delivered, and if it was delivered we would ascertain where it was stored, and we would collect it and bring it to Power House No. 1. It was not our purpose to issue requisitions except for what was ordered by Hercules.

Q. The point is, Mr. Joslin, that you never issued a single requisition for a single water-wall tube? A. No, sir.

Q. Do you have in your possession the records of Hercules Company showing when they requisitioned any of those tubes? A. No, sir.

Q. Have you asked for them?

A. I would not have any of the Hercules Company's records.

Q. Have you asked for them? [892]

A. No; I haven't asked for the Hercules records.

Q. Isn't it true that these two hundred and twenty-four water-wall tubes had been requisitioned by the Hercules people from the Combustion Engineering Company prior to July 10th, 1944?

A. I would not know.

Q. Isn't it a fact that Mr. Clay of the Hercules Powder Company was in Washington, D. C., around July 10th, 1944, in an effort to expedite the manufacture and delivery of these water-wall tubes?

A. I would not know.

(Testimony of William Edward Joslin.)

Q. The fact is that you and your organization as such did nothing to expedite the delivery of this material at any time, but that you left the expediting of these water-wall tubes to the Hercules Company, who was charged with furnishing them?

A. No, sir; it was our responsibility to press the Hercules Powder Company for delivery of any materials they may have had on order; if the Hercules failed to expedite them sufficiently, we went then and attempted to acquire, or secure, Government assistance.

Q. Have you any records here showing what you did to expedite the material after July 14th?

A. That would be personal contacts. [893]

Q. By whom?

A. By Mr. Jung, Mr. Wedlick or Mr. Vasicek.

Q. Mr. Wedlick's deposition was taken in this case? A. I believe it was.

Q. But no questions were asked by you as to what was done after July 14th as to expediting this material?

A. I didn't make out the interrogatories, but I imagine the deposition itself would be the best evidence.

Q. Do you know of anything that Mr. Wedlick did to expedite this material after July 14th?

A. I knew his instructions. I wasn't there, and I would not know what he did or did not do.

Q. Do you know what he did after August 19th?

A. I would not know, particularly, what he did, but I knew what his duties were.

(Testimony of William Edward Joslin.)

Q. It is a fact that these water-wall tubes had been on order by the Hercules Company from the Combustion Engineering Company prior to the time the contract was awarded to the plaintiff?

A. As I understand it, all of the boiler drums, tubes and headers were on order with the Combustion Engineering Company, placed there by the Hercules Powder Company. I do not believe that the Hercules people knew what tubes were missing any more than we did. It was only by an inventory and check by the Combustion Engineering Company, more so [984] than the Power Service Corporation, that it ever developed what tubes were missing.

Q. You don't mean to convey to the Court the opinion here that these tubes were ordered, manufactured and delivered after our requisition notice of August 19th?

A. I don't know just when the last tubes were delivered. I do know the approximate date that the Combustion Engineering Company notified the Power Service Corporation of some materials.

Q. Isn't it a fact that the Combustion Engineering Company notified the Power Service Corporation that they were going to be six weeks late? And that was known to Mr. Borst at the time he wrote you the letter of August 3rd estimating a six weeks delay?

A. The only thing I know is a copy of Mr. Borst's letter to us, that Mr. Bennett of the Combustion Engineering Company had advised him of

(Testimony of William Edward Joslin.)

the shortage of tubes, and that was not developed by the Power Service Corporation, but the Combustion Engineering Company's Mr. Bennett. It was something that Mr. Bennett developed on his own behalf, and for the Power Service Corporation.

Q. That was developed, however, prior to August 23rd?

A. The notice I got was on August 19th.

Q. Are you intending to convey the idea to the Court that these tubes were not being manufactured as early as July 10th, [895] 1944?

A. I am not trying to convey anything to the Court. I am trying to answer your questions, Mr. Watts.

Q. What I am getting at is this: The tubes,—the water-wall tubes had already been ordered by the Hercules Powder Company from the Combustion Engineering Company prior to the time this contract was let; isn't that true?

A. It is, assuming the Hercules people placed the order for the entire boiler at one time, which was prior to this contract.

Q. Which would, of course, include the individual number of each one of these tubes, wouldn't it?

A. Which would include each and every tube, and each and every header, but no assurance that they would be there on the site at the time the contract was let.

Q. And that was what Mr. Clay was doing in Washington, expediting these water-wall tubes?

A. If you want my opinion on that, he would

(Testimony of William Edward Joslin.)

not know what a water-wall tube was, let alone expediting them.

Q. But his duty was to expedite the water-wall tubes?

A. His duty was as expediter for the Hercules Powder Company.

Q. You don't have any knowledge of the time when these water-wall tubes were requisitioned from the Combustion [896] Engineering Company by the Hercules Powder Company? A. No.

Q. Do you know of anything that was done by the Hercules or the Combustion Engineering Company with respect to these water-wall tubes after our letter of August 19th to you?

A. Only from general information that they were working on them.

Q. They had been working on them for some months?

A. I don't believe so, because of the fact that the power house was ordered in stand-by condition, and I don't think the Combustion Engineering would continue to manufacture a boiler for a power house in stand-by condition.

Q. Isn't it a fact when resume-work order was given it was known by Mr. Clay and Mr. Neubauer of the Hercules people that these tubes were missing, and that they were put to work immediately to get these tubes there on the site so they would be available for installation when the contract was let?

A. I don't think that is a fact. Mr. Neubauer

(Testimony of William Edward Joslin.)

was not on the site when this resume-work order was given.

Q. Are you in a position, Mr. Joslin, to give the Court any copies of requisitions, or letters, that will show when Hercules Powder Company ordered these tubes from the Combustion Engineering Company?

A. I am not in a position to do that. [897]

Q. Did you ask Hercules or Combustion Engineering Company for them? A. No.

Q. You have no records of your own showing when they were ordered?

A. No; I haven't. I might add that if we had asked for those I would not have gotten them. That was secret information.

Mr. Watts: I think possibly the Court will take judicial notice of the fact that neither of us could get that information.

Q. (Mr. Watts, continuing:) Coming down to the matter of the progress schedule, I believe that you stated that one of the purposes of a progress schedule was to enable the Power Service Corporation to draw down a percentage of its total contract from time to time; that is true, is it not, Mr. Joslin?

A. You mean by application for payment?

Q. Yes. A. Yes, sir; that is true.

Q. Another purpose was to designate the time when the Power Service Corporation should commence on one type, or one segment, of work, and when it should have that work ended? [898]

(Testimony of William Edward Joslin.)

A. Not necessarily.

Q. Well, Mr. Joslin, there is a certain provision of the contract that made time of the essence of the contract? A. Yes, sir.

Q. And that meant that the job as a whole had to be completed within one hundred and twenty days? A. That is right.

Q. But you say it was not the purpose of the schedule to determine when they should start and when they should end any operation on this project, or any portion of the work?

A. Not necessarily.

Q. Also, another purpose was to enable you, the A-E-M, and the Hercules people and any others who were responsible for furnishing material, to know when certain materials were needed?

A. Definitely not.

Q. Well, now let us take, for example, Exhibit No. 64, the steam generating unit, the schedule, that is, the construction schedules show that the plaintiff was to commence work on boiler No. 1 on what date?

A. Segment No. 3, boiler No. 1?

Q. That is right.

A. They proposed to start on July 19th.

Q. And at the same time you proposed to have available [899] for them on that date the drums, tubes and water-wall headers, did you not?

A. No.

Q. You did not?

A. You mean all of them?

(Testimony of William Edward Joslin.)

Q. Well, enough for them to start.

A. Yes, sir. Not necessarily the headers and the drums—not necessarily the headers or the tubes, but we were supposed to have material for them to start on the work.

Q. And you were supposed to have material there to enable them to complete that work by November 10th?

A. To complete by November 10th.

Q. And the same is true of all of the other equipment, that you were obligated under your contract to furnish, that is, the equipment and the materials which you were to furnish, that is—it was to be furnished in time for them to have a reasonable time thereafter to complete their contract according to the schedule?

A. If the material was available; yes; to get the material there as quickly as possible, with the full intention of their completing prior to November 15th, with the modifications, and prior to November 10th, before the modifications, but we were not obligated to furnish them material so that it was certain that they would be complete by that time. Neither the contracting [900] or ourselves knew what might happen in the installation of that boiler, so that it might not be completed by November 10th. By that I mean, we were not in a position to know that something would not happen to make it impossible to complete it by November 10th.

Q. And you contemplated when the contract was

(Testimony of William Edward Joslin.)

entered into that you might not be able to deliver this material for the contractor to install it according to the schedules? A. That is correct.

Q. That is one of the things that you took into consideration when you executed this special clause on the signature page?

A. No, sir; I didn't take into consideration anything. I was not responsible for that.

Q. So your testimony is that the purpose of this progress schedule was not to designate the dates upon which you were required—reasonably required to furnish materials for installation?

A. This schedule is presented for the purpose of establishing a date when the Power Service Corporation proposed to start operation on a particular portion of this job. It does not necessarily mean that they have to start on that particular date; neither does it mean that we have the material on hand on that date. It represents a date that they propose to start and also a date that they propose to finish. It does not mean that we have to [901] have the material, as I said, immediately on the date, nor does it mean that they have to start, nor have to complete, on the date designated, or shown on the proposed schedule in order to complete within the one hundred and twenty days. For example, under the item "main and auxiliary high pressure units," there was no shortage of material there, and they proposed on that chart to start on July 13th and they actually started on August 8th.

(Testimony of William Edward Joslin.)

Q. Well now, Mr. Joslin, the question I am asking is this: Does the schedule reasonably apprise you of the time when the materials were required to be there?

A. The schedule informs me of the date that they propose to start that segment of work. The material is assumed to be there until such time as we receive a requisition advising us that the material is not there.

Q. But you say some of the materials were not there?

A. It is assumed that the material is there until such time as we are advised by requisition that the material is not there.

Q. You were advised as early as July 13th that the material was not there?

A. That is correct, but that information was of no value to us.

Q. Did you do anything on July 14th to expedite the [902] missing material so it might be present when they would call for it?

A. I don't know that we were aware that the material was present or absent on that date.

Q. But you were aware of that fact on August 19th?

A. That is correct.

Q. And what did you do after August 19th?

A. We would follow the very normal procedure and advise the Hercules people of the information we had for the Power Service Corporation—

Q. (Interposing:) Mr. Joslin, have you any record of what you did after August 19th?

(Testimony of William Edward Joslin.)

A. Nothing that we did in relation to any requisition. Such record was not necessary to be kept.

Q. Were the times that it was specified in this progress schedule on which the work should be commenced, was it reasonable in every respect so far as the time allowed for the completion of the contract in one hundred and twenty days?

A. I say that the one hundred and twenty day period was a reasonable time to complete this contract.

Q. Did you make any objection to any part of the progress schedule after it was approved by the contracting officer on August 22nd?

A. After it was approved by the contracting officer, we [903] received a copy—an approved copy. What transpired prior to that I do not know.

Q. Did you make any oral or any written complaint to the plaintiff about the reasonableness of the progress schedule?

A. No; we believe it was reasonable.

Q. You believe each of the parts, or segments, specified in the progress schedule was reasonable?

A. We believed that each segment could be completed within the one hundred and twenty days, which time we believe was reasonable.

Q. Where does Mr. Hagan live?

A. I think in Emporia, Kansas.

Q. And where does Mr. Jung live?

A. Emporia.

Q. Mr. Vasicek, where does he live?

A. Denver.

(Testimony of William Edward Joslin.)

Q. Did you make any attempt to take the depositions of these men? A. No, sir.

Q. Do you have in your files Mr. Jung's report in connection with the performance of this contract?

A. I have the labor reports that I found in the files. I don't think Mr. Jung prepared them.

Q. Have you any reports made by Mr. Jung—he was in your employ? [904]

A. Yes; he was.

Q. Have you any of his reports?

A. I would not know.

Q. Wasn't a copy of all of his reports collected to be used in connection with this trial?

A. The only thing we looked up was the correspondence that you had in your stipulation of facts that we tried to secure copies of.

Q. I am now reading Article Three on page 8-B of the contract: "If the subconstructor refuses, or fails, to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article One, or any extension thereof, or fails to complete said work within such time, the constructor may, with written notice to the subconstructor, terminate its right to proceed with the work, or such part of the work, as to which there has been delay. In such event, the constructor may take over the work, prosecute the same to completion by contract, or otherwise, and the subconstructor and its sureties shall be liable to the constructor for

(Testimony of William Edward Joslin.)

any excess cost occasioned the constructor thereby. If the subcontractor's right to proceed is so terminated, the constructor may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor. Provided, that the right of the subcontractor [905] to proceed shall not be terminated under this Article, because of any delays in the completion of the work due to causes beyond the control and without the fault or negligence of the subcontractor, including, but not restricted to Acts of God, or of the public enemy, acts of the constructor, acts of the Government, including, but not restricted to any preference, priority or allocation order, acts of other contractors or subcontractors in the performance of contracts or subcontracts with the Government or the constructor, fires, floods, epidemics, quarantines, restrictions, strikes, freight embargoes, and unusually severe weather or delays of the subcontractor's subcontractors due to such causes." Did you ever serve any notice of any kind on the Power Service Corporation—

Mr. Gibson: Just read the rest of that now, Mr. Watts.

Mr. Watts: Very well. "In which event the contracting officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the

(Testimony of William Edward Joslin.)

parties hereto, subject only to appeal within thirty days by the contractor to the Secretary of War, or his duly authorized representative, whose decision on such appeal as to the facts of [906] delay and the extension of time for completing the work shall be final and conclusive on the parties hereto."

Q. (Mr. Watts, continuing:) Did you ever serve any written notice on this plaintiff, or representative of the plaintiff, in respect to any delays in accordance with this contract?

A. No, I didn't. I had no authority to do so under the terms of my contract.

Q. You didn't serve any such notice?

A. No, sir; that is correct.

Q. Now, I have turned to paragraph 1-10 of the specifications, and I will read that: "The sub-constructor shall within seven days after receipt of the Notice to Proceed, prepare and submit to the constructor for approval a practicable and feasible schedule showing the order in which the subconstructor proposes to carry on the work, the dates on which he will start the several salient features including procurement of plant and equipment, and the contemplated dates for completing the same. The schedule shall be in the form of a progress chart of suitable scale so as to indicate appropriately the percentage of work scheduled for completion at any time. The subconstructor shall enter the actual progress at the end of each week, and shall immediately deliver to the con-

(Testimony of William Edward Joslin.)

structor three blue-print copies of the same.” Did you ever make any complaint to the plaintiff [907] in writing or otherwise about their failure to furnish progress charts in this case?

A. No, sir.

Q. Do you know of any representative of yours that did this? A. I do not.

Q. And—

The Court: Isn’t it in the record that there was no complaint about how this project was constructed and handled, that there was no complaint about his work, or his failure to go ahead in any manner?

A. I have tried to convey that information; yes.

The Court: I think it is very clear, and no doubt it is clear in the record, because it is clear to the Court that the work was satisfactory in every way, that there was no complaint made, nor was there any foundation for any complaint.

Mr. Watts: All right. I will pass that up.

Q. (Mr. Watts, continuing:) When was the first time that any complaint was made by you that the plaintiff delayed—delayed in the performance of its contract—I will withdraw that, please. I will put the question this way: Are you familiar with the answer filed by your counsel in this case?

A. I don’t know whether I am or not.

Q. Do you know whether they ever made any complaint in [908] the answer in this case?

A. I don’t know.

(Testimony of William Edward Joslin.)

Q. Complaint that the plaintiff delayed in the performance of this contract?

A. I don't know.

Q. You were present at the taking of the four depositions in Minneapolis, and were also present at the taking of two more depositions in Kansas City in connection with the trial of this case?

A. That is correct.

Q. Did you or your attorneys ask of any one of these six witnesses one single question about delay, or alleged delay, in the performance by the plaintiff of the contract?

A. I would not know without reviewing the testimony.

Q. Do you recall any question asked about the matter of delay? A. I don't recall of any.

Q. Now, Mr. Joslin, you prepared a number of exhibits which are schedules, or copies of schedules, commencing with Exhibit "P" and going through and including Exhibit "W", in which you show, or attempt to show where the plaintiff was in default in the performance of this contract?

A. That is correct.

Q. I hand you Plaintiff's Exhibit No. 71, and ask you [909] what is an "S" curve on the progress chart?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 71, for purposes of identification.)

A. It is a curve that shows the proposed pro-

(Testimony of William Edward Joslin.)

gress allowing for intersection points to state the percentage completed on any given date.

Q. It is true, is it not, that you can refer to this "S" curve on a chart and show, or rather, determine the rate of percentage performance per day any day during the performance of the contract? A. Yes, sir; that is right.

Q. The "S" curve shows at the beginning of the performance a very low percentage per day of performance?

A. It shows a lower percentage of performance at the starting of the contract.

Q. And at the conclusion it shows a much lower percentage of performance than it does in the middle of the contract?

A. This particular curve, as do most curves.

Q. Now then, the solid line that runs across plaintiff's exhibit No. 64 is known as the "S" curve? A. That is correct.

Q. When you prepared these schedules for the benefit of the Court did you follow the percentage rate of performance per day as shown by that curve at any point, or did you, as we say in engineering parlance, follow a straight line curve?

A. I didn't follow a straight line, neither did I project the "S" curve over the entire project. I have each item by itself.

Q. Each item by itself is in turn covered by the "S" curve?

A. That is correct. I make an "S" curve duplicate—

(Testimony of William Edward Joslin.)

Mr. Gibson: An "S" curve you say, Mr. Joslin?

A. An "S" curve.

Q. (Mr. Watts, continuing:) Didn't you take the total number of days shown on the "S" curve, that is, as shown to perform this work, the total number of days — and make an average of the whole thing?

A. I made an average on each item.

Q. There is an "S" curve of performance on each segment of the chart?

A. That is correct.

Q. Now, Mr. Joslin, let's take boiler No. 2 as an example: The total time allowed to perform the work on boiler No. 2 was July 20th to November 4th, a total of one hundred seven days?

A. On the over-all, that is correct.

Q. This curve shows seventy-one days were allowed in which to do eighty-eight per cent of the work?

A. This cross-hatch, the over-all percentage shows [911] seventy-one days, eighty-eight per cent in seventy-one days.

Q. It also gave the contractor thirty-six days to perform twelve per cent of the work. Now, the reason for the thirty-six days is because they retain a very little work to do on the last part of the curve?

A. You take the individual curves, Mr. Watts, and you will see that the latter part of the work they proposed to do faster, and the longer part, or period, they retain that for themselves.

(Testimony of William Edward Joslin.)

Q. Let us take boiler No. 3: The progress schedule allows from July 20th to November 10th, or one hundred thirteen days?

A. That is correct.

Q. The progress schedule also allowed us eighty-two days in which to do ninety per cent of the work? A. Yes, sir.

Q. And it also allows thirty-one days in which to do the last ten per cent?

A. You proposed ninety per cent of the work in eighty-two days, then they keep thirty-one days to pick up the ten per cent. You don't have to do that, because you take the individual charts and they don't show that. Your individual charts are correct, finally. They show a greater part of the work toward the end than the first of the job. You have carried that cross-hatch portion now to bring your completion date to November 10th, [912] and it is not a true picture of what you propose to do. The individual items are not taking the dates of July 20th to November 10th. You show that you will do all of this work between certain dates, and you propose by your schedule to do the last twenty per cent faster than the first twenty per cent, and it holds true on all of the charts. It is a true picture of what you proposed to do.

Q. Let us take the over-all chart: On October 27th our chart shows that we should have been ninety-five per cent completed at that time?

(Testimony of William Edward Joslin.)

A. Yes, sir. In October you proposed to be ninety-five per cent complete.

Q. That means that to do the last five per cent we had fourteen days in which to perform that work?

A. It shows that you had fourteen days; if the cross-hatch were extended.

Q. But, Mr. Joslin, the schedule allows fourteen additional days from October 27th in which to complete the five per cent. The point I want to make is that each item of the contract, or of the schedules, allows much more time to finish the last five or ten per cent than the remainder of the job?

A. But you would still have the same amount of work to do if you had the full curve. Now, that will be developed from these charts—

Q. (Interposing:) The average time, for example, on the [913] basis that you compute, will you give me the percentage on this exhibit No. 71 of the over-all contract that was to be performed each day?

A. I would have to develop the "S" curve.

Q. Please give me the result by using the average, as you did on these other charts?

A. I cannot do it here.

Q. All you have to do is divide one hundred twenty into one hundred per cent.

A. You have to take each item, the value of each item as shown, and that transposes all of these figures.

(Testimony of William Edward Joslin.)

Q. In that example, you took the average from the beginning to the end of the contract?

A. That is right, and the individual items, they are developed on the "S" curve applied to each individual item, and then you show the step on your curve, and when you take the total of the items you show a particular day at the bottom and top. You have little to do here (indicating), and you are late in starting here (indicating).

Q. But on each of these exhibits you use the average from the beginning to the end?

A. That means that you follow this line as dotted across 71 instead of the solid line across exhibit 71, in arriving at the average rate of performance per day. We follow a straight line on each item which will develop the "S" curve [914] on the over-all—this is the "S" curve on the over-all (indicating).

Q. Well, Mr. Joslin, take the piping system: On October 27th what does our schedule show we should be finished?

A. That you should be ninety-five per cent complete on October 27th. If you are eliminating the miscellaneous items you are ninety-seven per cent.

Q. We show, without eliminating anything, that we should have completed ninety-five per cent?

A. Yes, sir.

Q. So that we have five per cent yet to perform? A. Yes, sir.

Q. On October 27th we have still five per cent of that work to complete? A. That is right.

(Testimony of William Edward Joslin.)

Q. And that schedule shows that we had fourteen days to finish that five per cent?

A. That is running the cross-hatch out to November 10th.

Q. But we were given fourteen days in which to finish?

A. You had to November 10th for the completion date.

Q. Then this one segment gave us fourteen days?

A. That is the proposed schedule.

Q. It allows fourteen days to complete five per cent?

A. This shows fourteen days left after ninety-five per [915] cent of the contract is completed.

Q. The progress schedule shows that we were entitled to fourteen days time after we had completed ninety-five per cent of the work?

A. It shows no such thing—it shows on October 27th that you were ninety-five per cent completed, and it shows on November 10th that you were ninety-five per cent completed.

Q. But that is a difference of fourteen days in which to do this five per cent of the work?

A. You haven't one hundred per cent designated on the progress chart. You show ninety-five per cent on October 27th, and the completion date is November 10th.

Q. Should we have one hundred per cent on November 10th we would have—

A. (Interposing:) That is on all of the items.

Q. Should we have one hundred per cent on

(Testimony of William Edward Joslin.)

November 10th, we would have fourteen days in which to do the last five per cent?

A. Your progress chart shows ninety-five per cent completion on October 27th, and you have—if you fall behind you have still fourteen days to pick it up, but you don't show any proposed time to be one hundred per cent complete. You retain that much time to pick it up.

Q. Assuming that we were ninety-five per cent complete [916] on October 27th, we had fourteen days to do five per cent of the work?

A. Assuming that you were 88.2 per cent complete, you still have fourteen days to complete over eighteen per cent of the work.

Q. If we were 88.2 per cent finished on October 27th, at the rate shown on the schedule—the progress schedule, what would be the rate of percentage per day that we were required to perform to do this balance of five per cent and be completed in the one hundred and twenty day period?

A. I don't understand that question. I don't know when you intended to complete. You do not show that.

Q. On the basis of having fourteen days to do the five per cent?

A. I know what you were doing on that job.

Q. Isn't it a fact that we would be required to do thirty-five one-hundredth per cent per day?

A. I know what you have done.

Q. But I am asking what would that average rate per day be?

(Testimony of William Edward Joslin.)

A. If you had fourteen per cent to finish, I still don't know what time you proposed to do that five per cent of the work in.

Q. Fourteen days. [917]

A. The progress chart does not show that.

Q. But we had fourteen days in which to finish.

A. The progress chart shows eighty-eight and two-tenths per cent on that date, as being completed.

Q. Our progress chart shows that we were supposed to be ninety-five per cent complete on October 27th, and we had five per cent to go on October 27th, according to our proposed schedule.

A. If you maintained the schedule, you mean?

Q. If we maintained our schedule we still had fourteen days in which to do the last five per cent of the work, according to the progress schedule?

A. If you had maintained your schedule you still had more than five per cent.

Q. Mr. Joslin, back to this "S" curve again: At the end of the "S" curve the rate of percentage is much less than it is in the middle of the "S" curve?

A. Providing you maintain the schedule?

Q. Well, let us suppose that we maintain our schedule, what per cent per day would be required of us to perform after we had ninety-five per cent of the work completed in order to get five per cent done in fourteen days? Is that $35/100$ of one per cent?

A. Yes; it would be. [918]

Q. On October 27th what were the actual figures of the percentage of work completed?

(Testimony of William Edward Joslin.)

A. 88.2, and no shortage of material in that segment.

Q. What remained to be performed?

A. 11.8 per cent.

Q. But using the schedule itself, the rate of performance from October 27th to November 10th would be 35/100 of one per cent?

A. That is what you say.

Q. Isn't it a fact that from October 27th at the same rate—isn't it a fact that we would have thirty-four days in which to complete the remainder of the contract? Is that right?

A. No; not thirty-four days—fourteen days, according to your figures.

Q. We had eleven and eight-tenths per cent to perform. If one performs 35/100 per cent per day, how many days would it take?

A. Where do you get the 35/100?

Q. I divided it.

A. That is a lee-way in case you are behind. That is why you have the fourteen days left. That is a lee-way in case you are behind your schedule.

Q. Well, let us take some specific example. Will you [919] look at Exhibit "T" and tell the Court how many days you allowed us, according to your estimate, in which to complete the brickwork on boiler No. 2? Isn't it a fact that you allowed us eleven days?

A. Is that the brickwork on boiler No 2?

Q. Yes; on No. 2.

A. That is right.

Q. Let me assume, if it is not a fact, that you

(Testimony of William Edward Joslin.)

show on October 27th that we were thirty-eight per cent complete? A. Yes, sir.

Q. And we had sixty-two per cent yet to perform? A. That is right.

Q. You gave us eleven days in which to complete this sixty-two per cent?

A. That is right. The job was on a one-shift basis. The specifications call for two shifts, holidays were necessary, and this was set up on a two-shift basis. You would double the proposed installation.

Q. Isn't it a fact that you used the average percentage rate performance per day in arriving at that answer?

A. The average straight through, because it is reflected in your own individual sheet as the Court may see. That shows a fairly certain average. Here is the last five per cent. It is consistent throughout.

Q. Now look and see if the curve—the "S" curve allows nineteen days to do the last sixty-two per cent, which you represented to the Court that we should get through in eleven days. Find it on the "S" curve.

A. We are not concerned with this "S" curve.

Q. But what we proposed to do was the last sixty-two per cent in nineteen days?

A. That is possible.

Q. In your exhibit "T" you require it in eleven days. How many days did the schedule allow us to do it in? A. You mean the brickwork?

Q. Yes.

A. This didn't—

Q. (Mr. Watts, continuing:) Schedule "T"

(Testimony of William Edward Joslin.)

shows that you estimated that we should finish the last sixty-two per cent of the work on Boiler No. 2, the piping system, in eleven days?

A. You mean this brickwork?

Q. Yes. I beg your pardon—the brickwork.

A. On two-shifts, that is the rate that is set up on. It is on a two-shift basis.

Q. You allowed us eleven days?

A. On the double shift.

Q. What does the progress chart allow us?

A. It shows nineteen days to do the last sixty-two per cent.

Q. Yes. And eleven days by your exhibit “T”?

A. And nineteen days by the progress chart, and I will clear that up.

Q. Surely.

A. Your progress chart shows that you will complete the brickwork on boiler No. 2 thirty days after the drums, tubes and headers are in place. Your progress chart shows that you will complete the work thirty days after these drums and tubes and headers are in, and twenty-nine days after the drums, headers and water-wall tubes are completed on boiler No. 3. That is what the progress chart shows, but what you actually did—

Q. (Interposing:) I am not asking you for that. What I want to know is, what the progress chart allows after thirty-eight per cent of this work is completed, and I say it allows nineteen days?

A. It also shows that you will be completed—that this [922] work will be completed a certain

(Testimony of William Edward Joslin.)

number of days after the drums, tubes and headers are in place.

Q. The only thing I want to know is, whether the progress chart shows that we are allowed nineteen days to complete after thirty-eight per cent of the work is finished?

A. It shows that you will be further advanced than the thirty-eight per cent.

Q. The question, Mr. Joslin, is, whether the chart shows that we are allowed nineteen days after thirty-eight per cent is completed in which to finish the work? A. Yes.

Q. Your exhibit "T" allowed us eleven days in which to complete eighty-two per cent of boiler No. 3 brickwork? A. That is correct.

Q. Will you tell the Court what the progress schedule shows that we are entitled to in days after thirty-eight per cent of that work is completed?

A. You are not entitled to anything, but if you maintain your schedule—

Q. (Interposing:) If we maintain our schedule we are allowed twenty-five days in which to complete that work?

The Court: Doesn't the chart show that the progress schedule was behind from the very start of this work?

A. On some of it, it does, your Honor. [923]

The Court: Generally, over-all, is that true?

Mr. Watts: Generally, it was behind schedule.

The Court: Then you were behind on this work?

Mr. Watts: Yes; on this work, behind the schedule.

(Testimony of William Edward Joslin.)

The Court: Then the question was not clear in the mind of the witness, possibly, as it was not in the Court's mind until you have now cleared it up.

Mr. Gibson: I was trying not to make any objections here in the interest of time.

The Court: I did not intend to interfere with this examination, but because the question was asked and it was answered by the witness, and I was simply wondering if the question assumed the condition as I understand it from the progress chart. I thought his answer was based on the progress chart, on the percentage of work shown.

Q. (Mr. Watts, continuing:) What I want to show is, in each one of these is that he has used a false premise.

Mr. Watts: I want to show that all of the testimony introduced by Exhibits "P" to "W" is based on the assumption that it is the accepted average. It is not the average per day under the "S" curve that has been spoken of, the percentage shown by the curve itself.

Mr. Joslin: That is a straight line and is developed from the chart itself. This curve will also develop itself [924]

Q. (Mr. Watts, continuing:) Will you answer this question—

A. (Interposing:) This (indicating) will give you the same thing right here, Mr. Watts.

Q. Will you answer this question, Mr. Joslin: The fact is that the chart shows here that we are entitled in which to do the last eighty-two per cent

(Testimony of William Edward Joslin.)

of the work twenty-five days on this brickwork on Boiler No. 2?

A. The chart shows that you will require twenty-five days to complete eighty-two per cent.

Q. And your exhibit "T" is based on the assumption that we should use only eleven days?

A. This represents a two-shift basis. This chart is on an eleven-day basis.

Q. Boiler No. 2 on the ash hopper, on October 27th that exhibit shows that we had done twenty-five per cent of the work? A. That is correct.

Q. So that on October 27th we had seventy-five per cent of the work yet to do?

A. This chart shows that you had taken fifty-eight days to do twenty-five per cent.

Q. You told the Court that we should complete this in three days by using two shifts?

A. That is correct. [925]

Q. Isn't it a fact that the chart allows us six days? A. On a single shift, yes.

Q. Now, on boiler No. 3 we had done five per cent of the work on October 20th?

A. On the ash hopper lining on October 20th there was five per cent done in fifty-three days.

Q. We had ninety-five per cent of that work yet to do? A. Yes.

Q. And you required us, according to exhibit "T", to do that work in four days?

A. I said that it could be done.

Q. The schedule allows us seven days?

A. On a one-shift basis.

(Testimony of William Edward Joslin.)

Q. Isn't it true in each segment you have taken the beginning date and the completion date, and averaged the percentage of performance per day?

A. That is correct, and that will develop the "S" curve.

Mr. Watts: I think that is a conclusion.

The Court: Go ahead with the questions.

Mr. Watts: If I have not done so, I will offer Exhibit No. 71 at this time.

The Court: I assume there is no objection, so it will be admitted. [926]

(Whereupon Plaintiff's Exhibit No. 71, so marked for identification, was admitted in evidence.)

Mr. Watts: And I also offer Exhibit No. 72.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 72, for purposes of identification.)

The Court: And it may be admitted.

(Whereupon Plaintiff's Exhibit No. 72, heretofore marked for identification was admitted in evidence.)

Q. (Mr. Watts, continuing:) Coming down to the measure of damages, I believe that you developed here yesterday that on boiler No. 1 there was an estimate of \$32,800.00 as the cost of the performance of that work? A. That is correct.

Q. And on the second, or boiler No. 2, you also brought that out as \$32,800.00 as the estimated cost? A. That is correct.

(Testimony of William Edward Joslin.)

Q. And boiler No. 3 shows \$33,400.00 as the cost? A. Yes, sir.

Q. Will you take the progress schedule and on my exhibit No. 73, I wish you would mark opposite boiler No. 1 the number of days the plaintiff estimated it would take to do the work on that boiler No. 1. A. Thirty-five days.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 72 for purposes of identification.) [927]

Q. Was it thirty-five, or thirty-two?

A. I think thirty-five.

Q. And have you marked that on Exhibit 73?

A. Yes.

Q. Now then, on boiler No. 2, will you take Exhibit 73 and mark the number of days estimated that it would take to do the work on that boiler?

A. Forty-one days.

Q. Have you so marked it? A. Yes, sir.

Q. Now then, on boiler No. 3 will you do the same? A. That is thirty-nine days.

Q. Now, what was the over-all time of performance of work on boiler No. 1?

A. The over-all performance was between the date of the contract and the date of completion, and the same is true on boiler No. 2, and the same on boiler No. 3.

Q. Do you mind looking at this Exhibit No. 64 and giving me the number of days for boiler No. 3 again, the number of days that it will require to set the drums, headers and water-wall tubes?

(Testimony of William Edward Joslin.)

A. The progress schedule that you proposed is thirty-nine days.

Q. Will you count those again? Isn't it forty-six days?

A. No, sir; it is forty-four days, though. [928]

Q. Do you mind erasing that mark of thirty-nine days and putting on Exhibit No. 73 "44 days"?

A. I have done that.

Q. Now, I hand you Exhibit No. 73, in its completed form it shows the cost of boiler No. 1 as \$32,800.00 and provided for thirty-five days to do the work? A. That is right.

Q. Isn't it a fact that the reason for the thirty-five days allowed for the work was that part of the work was done?

A. All I know is what you have on the chart.

Q. Do you know that part of the work was done on boiler No. 1? A. That is right.

Q. And we allowed thirty-five days to complete that work? A. That is right.

Q. And on the second boiler we allowed six days more, but the dollars and cents were the same?

A. Yes, sir.

Q. The last one we allowed nine days more, and allowed \$800.00 difference in the allocation of money for that boiler?

A. Yes, sir; that is what you show. That is the cost as represented by you here.

Q. In interpreting the schedule in terms of money and days, Exhibit No. 73 correctly reflects the amount of money [929] and the number of days?

(Testimony of William Edward Joslin.)

A. It reflects to me the fact that it cost \$32,800 to do this work in thirty-five days, and it cost \$32,800 on the second boiler to do the work in thirty-nine days—or, rather, forty-one days, that is, you accomplish in six days more work on the two with the same amount of money, and it also shows that you got \$33,400 to do forty-four days work. That cost is represented as being the same over here (indicating). You had more work on the second and the third, but your costs on this exhibit, which I think is an enlargement of your Exhibit No. 65, if I remember the number, the cost shown is identical per actual unit.

Q. But our schedule of time, however, allocated thirty-five days to do boiler No. 1?

A. Yes, and a hundred and five units.

Q. Boiler No. 2 shows an allocation of thirty-nine days?

A. This shows your expenditure the same as on No. 1, that you accomplished the same amount of work.

Q. There was more work on boiler No. 2 and No. 3 than there was on No. 1?

Mr. Gibson: They are talking now about money—

A. (Interposing:) If I may be permitted to finish my answer, I will grant that there was more work on boiler No. 2 [930] than on boiler No. 1, but they were done for the same unit cost.

Q. (Mr. Watts, continuing:) There was more

(Testimony of William Edward Joslin.)

work required to be done on boiler No. 3 than on boiler No. 1 and No. 2?

A. That is true, but you are including in your chart—your progress chart, additional items, taking into consideration that you place the additional items on your progress chart, it is all included and put down. The additional work he had to do he is compensated for. There are the air heater tubes on boilers No. 2 and No. 3 that are not on boiler No. 1. It was not on this boiler (indicating) and he has made an allowance of \$3,500.00 here on boiler No. 2; also on boiler No. 2 and boiler No. 3 there are cold air and gas ducts. That is not included in boiler No. 1. He had no cold air ducts on this boiler, and where he has duplicate work he has allowed the same amount of money. The duplicate items which are reflected in boilers No. 1, No. 2 and No. 3 are in the same amounts, and there is an allowance for the additional work on No. 2 and No. 3. That has been compensated for. On boiler No. 2 there is the item of brickwork which is marked with an allowance, or an estimate of \$3,050.00. That should be \$9,050.00. If you will add this and total it up you will find that it is a typographical error. That is the only item of cost greater in the first boiler, and that, I say, is an error. However, they are asking for [931] eight hundred dollars more to do the work on boiler No. 3, and they expect the cost to be eight hundred dollars more to do the same identical work.

Q. You know, as a matter of fact, that on ac-

(Testimony of William Edward Joslin.)

count of some material not being present that the Power Service Corporation had to pace their work accordingly?

A. I don't know what you mean by "pacing your work." On any contract you work as the work is available. I don't know what you mean by pacing the work.

Q. In the early stages of this contract the over-all picture shows that they were behind on some phases of the work, and on some phases of the work they were considerably ahead?

A. No. On no phases of the work were they ahead except one individual item, most of which was in place when they got there.

Q. Take the date of September 23rd on the "piping" schedule. That schedule shows that we should be what percentage complete on that work?

A. You should be sixty per cent complete on the over-all piping work—sixty-one and six-tenths per cent, as compared to what you had done—

Q. (Interposing:) What does the schedule show that we should have completed on September 23rd—I think you were [932] reading the wrong figure. On the piping system, what does it show?

A. Yes; I was. You proposed on the over-aall of the piping to be fifty per cent complete.

Q. And on that date we were 61.6 per cent complete? A. Yes, sir; that is right.

Q. The next item, which is boiler feed discharge and suction, on September 23rd the sched-

(Testimony of William Edward Joslin.)

ule called for seventy per cent completion on that work?

A. Yes, sir; that is right. On September 23rd the schedule proposed seventy per cent, and you were seventy-eight—the schedule called for seventy-eight, and you were seventy-eight per cent complete.

Q. I think it shows that we were 89.2 per cent complete?

A. 78, according to the chart I am looking at. You proposed to be 78 per cent complete, and you were 78 per cent complete.

Q. What item is that?

A. Boiler feed, discharge and suction.

Q. Will you look at the “low pressure exhaust and steam item”—that is No. 3?

A. As of September 23rd?

Q. Yes.

A. You proposed to be sixty-nine per cent complete, and you [933] were eighty-nine per cent complete.

Q. On September 23rd, Item No. 4?

A. I see. You proposed to be 66 per cent complete, and you were 80 per cent complete.

Q. 66 and 80? A. Yes, sir.

Q. The next, Item No. 5?

A. On Item No. 5?

Q. No; not Item No. 5. I am now looking at Item No. 4, what does that show?

A. That shows that you proposed to be fifty-five per cent complete, and you actually were sixty-three and eight-tenths.

(Testimony of William Edward Joslin.)

Q. Item No. 6, that shows zero as the proposed schedule, and fifty per cent actually done?

A. That is the drain and vent pipes?

Q. That is Item No. 6, on September 30th.

A. Yes; that shows zero as the proposed schedule.

Q. And we were actually completed fifty per cent?

A. Yes.

Q. Now, the auxiliary equipment, the schedule shows sixty per cent proposed, or required?

A. Is that of September 13th?

Q. Yes; I think that is the date.

A. What item is that?

Q. That is the over-all item. [934]

A. About thirty-eight per cent proposed, and actually forty—yes, about forty.

Q. And what about October 13th?

A. On October 13th you had proposed sixty per cent, and you were actually 63.7 per cent complete.

Q. Now, what about the ash handling units on October 13th?

A. You proposed to be seventy per cent finished, and you were seventy-five.

Q. What about the combustion and control instruments?

A. On October 13th you were proposed to be fifteen per cent complete, and you were twenty-seven per cent actually.

Q. So that as a matter of fact, on many of the items because of interruption in schedules from

(Testimony of William Edward Joslin.)

time to time the plaintiff was behind in some items, but on the other items he was ahead on some of them—on a good many items?

A. Well, during certain progress of the job, certain items would naturally be ahead, but the over-all was behind at all times.

Q. That is true. When the check was given by you on March 19th for one thousand dollars, you still owed one thousand dollars on the contract price, did you not?

A. There was one thousand dollars retained prior—

Q. (Interposing:) That one thousand dollars does not purport [935] to cover any damages allowed for failure to deliver material on time?

A. No; no damages.

Q. It was the small balance due on the contract? A. Yes, sir.

Mr. Watts: That is all.

Redirect Examination

By Mr. Gibson:

Mr. Watts: Pardon me. I forgot to offer in evidence the exhibit I had marked as 73.

Mr. Gibson: I have no objection to it.

The Court: It may be admitted simply as an illustration.

Mr. Scholz: What do you designate that?

Mr. Watts: That is designated as a progress schedule break-down.

(Testimony of William Edward Joslin.)

(Whereupon Plaintiff's Exhibit No. 73, heretofore marked for identification was admitted in evidence.)

Q. (By Mr. Gibson:) The black solid line—the pen line showing across the face of the schedule which council has referred to as the “S” line, or “S” curve, it represents the proposed percentage of accomplishment at any particular time, or on any particular day from the time they start at zero until they wind up the contract, that is, within the terms of the contract? [936]

A. The “S” line, or curve, reflects the amount of work accomplished from day to day, and the amount proposed to be accomplished from day to day, and is developed in this way: At first only a small portion of the work is done, at the very start, or at the first, and the line is flat, and then it steepens and the various items are completed as shown in the center, or the middle of the line, and then there is a flat part at the bottom which allows you time to pick-up what you may have lost in the center.

Q. You mean there is a flat place at the top, the zero, or starting point is at the bottom?

A. Yes; that reflects the amount of work which you propose between the start and the finish.

Q. And the dotted line is the actual amount of completion?

A. That reflects the amount of work at any time, at any particular date.

Q. And it reads in percentages?

(Testimony of William Edward Joslin.)

A. Yes, sir.

Q. And that is a summary of the various segments on the particular job in progress?

A. That is correct.

Q. A statement was made that you had recommended against giving this contract to any subcontractor, and later on suggested a cancellation of the contract with reference to your own contract with the A-E-M, under which you were paid a certain [937] percentage. Was there to be any provision in that of the same percentage that you might procure, even though the contract was not directly with you?

A. No. On subcontracts let by our government they would not allow a second profit; in other words, on a cost plus a fixed fee, we were given our percentage, and it was seven-tenths of one per cent of the amount of work that we had at that time, and when they let a subcontract we, as the prime contractor—we were allowed a fee of one-tenth of one per cent of our fee in existence at that time. This contract for one-half million dollars, our fee on that contract would have been approximately \$350.00. We got one-tenth of seven-tenths of one per cent for financing that, and supervising it.

Q. The A-E-M had their general contract?

A. They got their regular fee.

Q. Any contract with the A-E-M, to which this contract is tied in, is there a provision that they can stop any part of the work at any time?

(Testimony of William Edward Joslin.)

A. There is a provision in it, yes.

Q. And that would follow in any work under your control?

A. On any subcontract which was let, the insulation work which was let to various subcontractors, and the Power Service Corporation contract for power house No. 1.

The Court: Could they suspend for five or ten days [938] and require you to go ahead?

A. Yes; in fact, we were ninety per cent completed on what we called the "B" line. It was the smokeless powder line—about ninety per cent completed, and they suspended all operations on that line because they got a new development in that sort of powder. We started to put in what we called Line "E". We also called that the stick powder, and that was about ninety-five per cent completed when suspension of operations was ordered on that, and then we went on what we called the "G" line, and we got that line about ninety per cent completed when it was ordered suspended, and we went on the "F" line, and they got a new rocket powder, and ordered that suspended. We left those three lines which were terminated during this period, and then when the Bulge Invasion was going on, they ran short of smokeless powder, and then they issued orders to place lines "B" and "C" in operation. Now, that was closed to a year and a half after they were placed under suspension.

The Court: Was there any reason — in case

(Testimony of William Edward Joslin.)

there was delay on account of the manufacture of water-wall tubes or headers—why the Government could not have suspended this contract for ten or fifteen days until they could get these headers and tubes?

A. If the Government felt that it was desirable they [939] could have done that, but we could not do that. That would have to come from the Government. Since the Power Service Corporation was doing this work, we couldn't, and wouldn't recommend a suspension of operations.

Q. (Mr. Gibson, continuing:) In this matter with reference to the tubes, headers and drums, after a certain period of time certain tubes that were on the ground there were determined to be defective, and orders were issued about August, the latter part of August, or September the first—do you recall such a requisition for some thirty-two tubes to replace the defective ones?

A. Yes; I remember that.

Q. I believe the requisition was on August 31st, or September 1st. After that the tubes were delivered to the site about what time, Mr. Joslin?

A. The last tubes were delivered on September 20th, or the 26th. I don't remember which.

Mr. Gibson: I believe that is all.

Redirect Examination

By Mr. Scholz:

Q. Mr. Joslin, if the additional clause on the signature page of the contract, if that had added anything more to the contract, that is, any burden

(Testimony of William Edward Joslin.)

on you, wouldn't your contract, or would it, have been revised because of this claim, or because [940] of the additional burden on you, or would that be included in your original contract?

A. I might answer that by saying—you are asking if it would be necessary to revise the contract. I might say I assumed that any appendage to the contract would have to revise the contract, or the contract would have to be revised, but apparently I was wrong, because they added that to the signature sheet of the contract. If you will look back in the correspondence I believe I stated that I thought it would be necessary, but I was wrong, inasmuch as they did attach it to the contract.

Q. That does not answer my question. If this clause added to the signature page of the contract added to the responsibility, your responsibility, and the claim of the plaintiff, what effect would that have on a contract with the Government? Would you have to revise your contract with the Government?

A. I don't think it would have any effect. Personally, I don't think so.

Q. You considered that didn't add anything to the contract?

A. That is my personal opinion.

Q. I believe in answer to one of Mr. Watts' questions you stated that you were obligated to have the material on [941] hand so that the Power Service Corporation could complete their contract in time—if it could be done, I think your answer

(Testimony of William Edward Joslin.)

was. Now, I don't know of any clause in the contract that obligates you to deliver any material to the plaintiff at any time.

A. I don't know of any clause in the specifications that makes it obligatory on us to deliver any material of any nature on any date. Provision was made for us to deliver material and expedite it at the earliest possible date.

Q. After requisition was made, or without requisition?

A. After the requisition was in, and a definite shortage was established.

Q. Mr. Joslin, Mr. Watts asked you on Exhibit "T", I believe it was—he said you gave the Power Service Corporation eleven days in which to complete some certain portion of the work, and that the "S" curve, which has been referred to, gave the Power Service Corporation nineteen days. Is there any difference on these two, and if so, can that difference be reconciled? A. Yes.

The Court: I want to say that he has it all reconciled as far as I am concerned. I can see Mr. Joslin's theory, and I can see the plaintiff's theory as explained by Mr. Watts. They are both very plain to the Court.

Mr. Scholz: Then I will not go into that. [942]

The Court: It is not necessary, as far as the Court is concerned. However, I don't want to stop you on this. We have spent this much time, now we might as well go ahead.

Mr. Scholz: That is all.

(Testimony of William Edward Joslin.)

Mr. Gibson: This is Defendant's Exhibit "Y" that I have now.

(Whereupon document referred to was marked Defendant's Exhibit "Y" for purposes of identification.)

Mr. Gibson: We offer that subject to any objection that counsel may see fit to make.

Mr. Scholz: What is that?

A. This is a chart enlarged showing the actual percentages of completion, particularly on boilers 2 and 3, of the brickwork, between certain dates, particularly between October 20th and November 17th, 1944. The Power Service Corporation's Exhibit No. 62 shows that the brickwork on boiler No. 2 will be completed in thirty—no; I guess it was thirty-one days after the drums, headers and tubes were completed on boiler No. 2. They show that the brickwork on boiler No. 3 will be completed in twenty-nine days after the drums, tubes and headers are in place. Now that is from zero to one hundred per cent. Here is what they accomplished in twenty-nine days.

Q. (Mr. Scholz, continuing:) What do you refer to now? [943]

A. The large schedule, the thirty day schedule, of the Power Service Corporation.

Q. But this is Exhibit "Y"?

A. Yes, sir; Exhibit "Y".

Q. Go ahead.

A. On October 20th they were thirty per cent completed on boiler No. 2, and eighteen per cent

(Testimony of William Edward Joslin.)

complete on boiler No. 3. On October 27th they were thirty-eight per cent complete on boiler No. 2, and twenty-six per cent complete on boiler No. 3. On November 3rd, they were forty-eight per cent complete on boiler No. 2, and thirty-six per cent complete on boiler No. 3. On November 10th they were sixty-seven per cent complete on boiler No. 2, and fifty per cent complete on boiler No. 3; on November 17th they were ninety-two per cent complete on boiler No. 2, and sixty-five per cent complete on boiler No. 3; of what they proposed to do in thirty days they actually accomplished 54.5 per cent completion in twenty-nine days.

Q. Was that after the drums, tubes and headers were placed?

A. After the drums, tubes and headers were in place. That is what they actually accomplished.

Mr. Scholz: That is all.

Mr. Gibson: That is all I have.

Recross Examination

By Mr. Watts:

Q. Do you know, Mr. Joslin, what the Power Service [944] Corporation was doing, what kind of work they were doing in this period of time between October 20th and November 17th?

A. I know that the brickwork was a separate contract which the Power Service Corporation was responsible for—it was their responsibility to see that the schedule was maintained. I don't know what the Power Service Corporation was doing at that time.

Mr. Watts: That is all.

Mr. Gibson: That is all.

The Court: You may call your next witness.

EDWARD M. GEORGE,

a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Gibson:

Q. Will you state your name?

A. Edward M. George.

Q. And your business or occupation?

A. Retired officer in the regular army.

Q. What was your position or occupation prior to retirement?

A. When I was retired I was a colonel in the engineering corps in charge of construction in eight western states. [945]

Q. What was your title in connection with that?

A. Division Engineer.

Q. What territory did that embrace?

A. Washington, Oregon, California, Idaho, Utah, Nevada, Colorado, Montana, and at certain periods there were portions of Arizona and Wyoming.

Q. What was the date of your retirement?

A. The 28th of September, 1944.

Q. You were on active duty in 1941, 1942 and 1943?

A. Yes, sir.

Q. For what period of time were you District Engineer?

(Testimony of Edward M. George.)

A. I was never District Engineer.

Q. I guess you referred to it as Division Engineer?

A. I was Division Engineer in the Mountain States Division with headquarters at Salt Lake City, Utah, for some time. In the Pacific Division, for one year and six months. Prior to that time I was Zone Constructing Quartermaster. Prior to that time the construction was turned back to the engineers covering the same territory.

Q. How many years have you had experience in Government construction contracts?

A. I have been purchasing, contracting and disbursing officer for twenty-five years prior to retirement.

Q. In connection with that, did you have charge of construction contracts? [946]

A. Exclusively; I had no other duties except construction work.

Q. You are familiar with contracts, and particularly with progress schedules such as have been discussed here the last couple of days?

A. Yes.

Q. When a progress schedule is approved, and certain shortages of materials have developed, which threw the contractor or subcontractor off his estimate—his estimated completion, or percentage of completion for a period of time, and then the materials—all of the materials necessary, arrive for the complete construction of the project, is there any reasonable excuse thereafter for the

(Testimony of Edward M. George.)

subcontractor not to maintain his estimated percentage of completion within the terms of his contract?

A. As I understand that question, it involves the period of time after the receipt of all materials?

Q. Yes.

A. My answer to that is no.

Q. During the war, was a delay of from thirty to thirty-nine days in the completion of a contract which originally estimated to be completed in a one hundred twenty day period, would that complete be considered unreasonable, provided the contracting officer deemed the delays not harmful to the war effort? [947]

A. It was very common to all contracts of any magnitude in which the Government was interested, or which was a Government contract, and the Government was not being damaged, or the war effort delayed, which was entirely up to the contracting officer to decide, and under those conditions, if there was no delay to the war effort, and the Government was not damaged, there was no push exerted. However, if the war effort was delayed, or the Government was being damaged, then it was our job to get in and needle the people to the point of making delivery.

Q. That was your job?

A. That was one of them.

Q. During the war were delays in construction work because of shortage of material during the construction a frequent occurrence?

(Testimony of Edward M. George.)

A. Very frequent.

Q. And were they frequently considered—or let me ask you: Were they, or was that condition, considered a hazard common to construction jobs during the war?

A. Before the war and during the war.

Q. Colonel, assuming that a building—the rock and concrete work of a building was in, and that this building was a power house, or intended for a power house, that a subcontractor was to install property of the total value of around \$1,150,000.00 into the complete power house, that there were three boilers to [948] install, and the accessories, would the period of one hundred and twenty days be a reasonable time for the completion of such a project?

A. It is my opinion that the time is ample.

Mr. Gibson: There is no further questions.

The Court: Do you have any questions to ask this witness, Mr. Scholz?

Mr. Scholz: No questions.

Mr. Watts: No cross examination.

Mr. Gibson: I would like to ask one more question:

The Court: Very well.

Q. (Mr. Gibson, continuing:) Colonel, you, on behalf of the Government, had charge of construction work amounting to a considerable amount of money?

A. I let something over one billion three hun-

(Testimony of Edward M. George.)

dred million dollars worth of contracts in one year.

Q. And—

Mr. Gibson: Is there any other question the Court would care to ask, or would care to have me ask this witness?

The Court: I don't think of anything.

Mr. Gibson: I will ask this one other question:

Q. (Mr. Gibson, continuing:) When a contractor makes a bid and receives his notice the bid is accepted, and he receives and signs for the notice to proceed, is that considered a contract [949] as between the parties—a completed contract between the parties as of that date?

A. That is my practice, and it is in accordance with the regulations and the law.

Mr. Gibson: That is all.

Mr. Watts: No questions.

The Court: Then I understand both sides rest.

Mr. Watts: The plaintiff has no rebuttal.

Mr. Gibson: We have rested.

The Court: Then this matter will be taken under consideration, and together with the determination of the case the Court will determine the motions presented, that is, I will take into consideration the motions that have been presented during the trial of the case.

Mr. Gibson: Very welll.

The Court: The exhibits, as there are a great many of them involved in this case, will be made available through the Clerk's office to counsel in working on their brief, as I imagine it will be of some assistance to them.

Mr. Watts: That will be appreciated, I am sure although I do have copies of my exhibits.

Mr. Gibson: I will be very glad to have the use of the exhibits.

(Which was all of the evidence and proceedings adduced in the foregoing case.) [950]

REPORTER'S CERTIFICATE

United States of America,
State of Idaho, County of Ada—ss.

I, G. C. Vaughan, the duly appointed, qualified and acting Official Reporter of the United States District Court for the District of Idaho, do hereby certify that I reported in shorthand the evidence and the proceedings adduced on the trial of the foregoing case, which was tried in San Francisco, California, before the Honorable Chase A. Clark, District Judge, beginning on the 18th day of March, 1947, and I thereafter caused said shorthand notes to be transcribed into longhand type-writing, and that the within and foregoing constitutes and is a full, true and correct copy of the transcript of the evidence and proceedings adduced at said trial, consisting of nine hundred and fifty-one pages.

In witness whereof, I have hereunto set my hand this the 12th day of July, A.D., 1947, at Boise, Idaho.

/s/ G. C. VAUGHAN,
Official Reporter,

[Endorsed]: Filed June 7, 1948. [951]

[Endorsed]: No. 11992. United States Court of Appeals for the Ninth Circuit. Power Service Corporation, a Corporation, Appellant, vs. W. E. Joslin, doing business as Cory-Joslin and Macnsons, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 22, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 11,992

POWER SERVICE CORPORATION,

a corporation,

Appellant,

vs.

W. E. JOSLIN, doing business as

CORY-JOSLIN & MACNSONS,

Appellee.

APPELLANT'S STATEMENT OF POINTS

The points upon which appellant intends to rely in this appeal are that the Trial Court erred:

1. In awarding plaintiff damages in the amount of Three Thousand Seven Hundred Fifty-three &

15/100 Dollars (\$3,753.15) instead of in the amount of damages established by the evidence, to-wit, the sum of Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88).

2. In its Findings of Fact No. 32 holding that appellant was delayed only two days on Boiler No. 1, instead of sixteen days as shown by the evidence.

3. In its Findings of Fact No. 33, holding that appellant was delayed only seven days on Boiler No. 2, instead of thirty-seven days as shown by the evidence.

4. In its Findings of Fact No. 34, holding that appellant was delayed only six days on Boiler No. 3, instead of forty-four days as shown by the evidence.

5. In its findings of Fact No. 35, holding that appellant was delayed a total of only fifteen days in completing its contract, and in the court's failure to find from the evidence that the appellant was delayed from November 10, 1944, to December 19, 1944, a total of thirty-nine days.

6. In its Findings of Fact No. 39, in which the court arbitrarily determined that the loss to appellant amounted to Two Hundred Fifty & 21/100 Dollars (\$250.21) daily, and in its failure to find from the evidence that the total damages amounted to Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88) made up of the following distinct and clearly established items of damage, to-wit:

Item 1:	Extra cost of equipment rental.	\$ 2,255.50
Item 2:	Extra cost of Supervisory personnel (except Borst).....	8,267.53
Item 3:	Extra cost of 90 days additional time and expense—Borst....	2,542.31
Item 4:	Home Office overhead.....	6,649.82
Item 5:	Loss in Efficiency.....	14,611.72
		<hr/>
		\$34,326.88

7. In its Conclusion of Law No. 5, insofar as the court held that plaintiff's damages were limited to the amount set forth in its amended claim.

8. In its Conclusion of Law No. 6, holding that appellant could not recover in excess of \$10,008.70, being the amount specified in its original claim dated June 30, 1945 (plaintiff's Exhibit 35).

9. In its Conclusion of Law No. 7, holding that appellant could not recover on any element of damages not included in its claim of June 30, 1945.

10. In that part of its Conclusion of Law No. 9 which held that appellant was entitled only to recover damages in the amount of Three Thousand Seven Hundred Fifty-three & 15/100 Dollars (\$3,753.15), instead of Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88), as established by the evidence.

11. By disallowing, in its computation of damages, all overhead expenses established by the evidence, to-wit, the sum of Six Thousand Six Hundred Forty-nine & 82/100 Dollars (\$6,649.82).

12. In that its opinion and decree are not supported by evidence and are contrary to law.

13. In that its opinion and decree are not supported by its Findings of Fact.

14. In that its opinion and decree are contrary to its Findings of Fact and the law.

15. In that its decree as to the amount of delay and the measure of damages is clearly erroneous and is not based upon substantial evidence.

/s/ LANCIE L. WATTS,
Attorney for Appellant.

(Service Statement attached.)

[Endorsed]: Filed August 16, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPLICATION FOR ORDER TO DISPENSE
WITH PRINTING OF EXHIBITS

1. Comes now the Appellant and moves the Court for an Order to dispense with the printing of the exhibits in the printed record of this appeal, and to allow appellant and appellee to refer this Court in the printed record, in the Brief and in the oral argument, to the original exhibits, and as grounds therefor, appellant states:

2. That the Record prepared by the Clerk of the District Court, and transmitted to this Court as the Record on Appeal, under order of the Trial Court,

contains all original exhibits for the inspection of this Court.

3. That there are 73 original exhibits offered by the plaintiff below, a list of which, marked "Exhibit A," is hereto attached and made a part hereof, and 25 exhibits offered by the defendant below, a list of which, marked "Exhibit B," is hereto attached and made a part of this Motion.

4. That these exhibits consist of letters, voluminous contracts, construction material inventories, requisitions for construction materials, construction material invoices, blue prints, construction schedules, payroll records, charts, graphs and pictures.

5. That many of the exhibits were copied into the transcript by the Reporter, and the pertinent one dealing with the amount of delay and the measure of damages are included in appellant's "Designation to Print," and to print the original exhibits would result in duplication and unnecessary expense.

6. That appellant's appeal is concerned only with the amount of delay found, and the measure of damages applied by the Trial Court.

7. That this application is made in the interest of economy.

/s/ LANCIE L. WATTS,
Attorney for Appellant.

(Statement of Service attached.)

[Endorsed]: Filed August 19, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER

Now on this date, the Court having read Appellant's Application for an Order to dispense with the printing of exhibits, and to permit appellant and appellee to refer this Court in the printed record, the Brief and the oral argument to the original exhibits, and for cause shown in said Application,

It is ordered that the printing of all original exhibits be dispensed with in the printed Record herein, and that appellant and appellee be allowed to refer this Court in the printed Record, the Brief and in the oral argument, to the original exhibits.

Dated August 19, 1948.

/s/ WILLIAM DENMAN,
U. S. Circuit Judge.

[Endorsed]: Filed August 23, 1948. Paul P. O'Brien, Clerk.

No. 11992.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

POWER SERVICE CORPORATION, A CORPORATION,
APPELLANT,

VS.

W. E. JOSLIN, DOING BUSINESS AS CORY-JOSLIN
AND MACNSONS, APPELLEE.

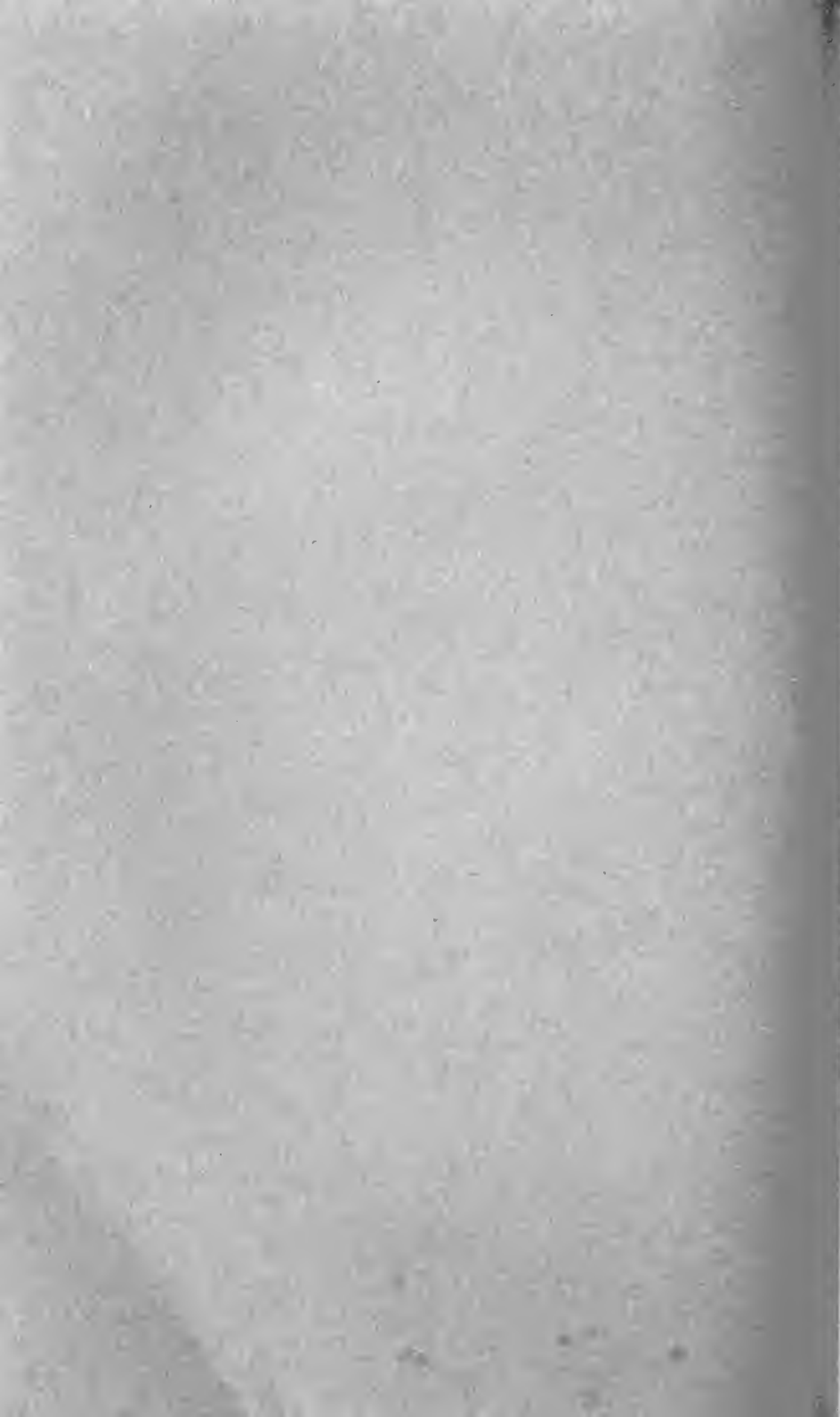
APPELLANT'S OPENING BRIEF.

LANCIE L. WATTS,
801 Scarritt Building,
Kansas City 6, Missouri,
Attorney for Appellant.

October 25, 1948.

OCT 26 1948

PAUL P. O'BRIEN, -
FILED



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No. 11992.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

POWER SERVICE CORPORATION, A CORPORATION,
APPELLANT,

VS.

W. E. JOSLIN, DOING BUSINESS AS CORY-JOSLIN
AND MACNSONS, APPELLEE.

APPELLANT'S OPENING BRIEF.

I.

STATEMENT OF VENUE AND JURISDICTION.

1. This is an appeal from the District Court of the United States for the Northern District of California, Southern Division, and involves a claim for damages in the amount of \$34,343.00. The jurisdiction of this court is invoked under 28 USCA 225 of the Old Code, and under Secs. 1291 and 1294 of the New Federal Judicial Code.

2. The decision of the District Court was rendered and entered on May 7, 1948 (R. 108) and the case was brought to this Court by a Notice of Appeal filed with said District Court on May 27, 1948 (R. 109). Appellant's Statement of Points was served upon the opposite party by

registered mail on May 26, 1948 (R. 112) and filed in the District Court on May 27, 1948 (R. 110).

3. The appellant is a Minnesota corporation. The appellee is a resident of San Francisco, California. The venue of the action, therefore, is in the said District Court. Old Code, 28 USCA Sec. 12; Sec. 1391(a) New Federal Judicial Code. Count I seeks a declaratory judgment and coercive relief in the amount of \$34,343.00. Jurisdiction for declaratory relief is given by 28 USCA 400 of the Old Code; Sec. 2201 of the New Federal Judicial Code. Count III seeks recovery of \$34,343.00, which gives the said District Court jurisdiction. 28 USCA 41(1) Old Code; Sec. 1332(a)(1), New Federal Judicial Code.

II.

OPINION BELOW.

The opinion of the District Court is officially reported in 76 F. Supp. 694, and appears in the Record at pages 52, 81.

III.

CONCISE STATEMENT OF THE CASE.

Nature of the Case. This cause involves a claim for damages in the amount of \$34,343.00 for delay in furnishing materials for the performance of a construction subcontract. Appellant alleges the delay to have been caused by the failure of the appellee to deliver materials at the site of the project at the time required by the construction schedule.

The Pleadings. The petition is in three counts. Count I seeks a declaration of rights under the contract as made.

In the alternative, if the declaration should be adverse, Count II seeks reformation of the contract to make it express the intention of the parties, and Count III seeks recovery on the contract if and as reformed. (R. 2).

The Answer (R. 47) in addition to appropriate admissions and denials, alleges that the action is barred by:

- (a) Estoppel
- (b) Release
- (c) Statute of frauds
- (d) Waiver
- (e) No consideration for "damage clause" on the signature page.

The "no consideration" defense was added as an amendment to the original answer during the trial. (R. 51).

The Court found for the appellant on Count I, for the appellant on all of the issues raised by the answer, dismissed Counts II and III and assessed appellant's damages at the sum of \$3,753.15. The appeal (by the plaintiff below) is from that part of the judgment awarding damages to appellant.

The principal question raised by this appeal is the legal measure of damages to be applied to the facts. Before that question was reached for decision by the District Court, however, the appellee raised the preliminary issue that recovery could not be had in any event for an amount in excess of \$10,008.70. Appellee's theory was that the receipt executed by appellant for \$1,000.00, dated March 18, 1946, limited appellant's damages to \$10,008.70, the amount specified in its claim of June 30, 1945 (Ex. 35).

On this issue the District Court decided that appellant could not recover in excess of \$10,008.70, and that it could not recover on any element of damages not included in its claim of June 30, 1945. (Conclusions of Law 6 and 7, R. 107). Appellant asserts, on the ultimate question as to the measure of damages, that the District Court does not follow the evidence as to the amount of damages; that it does not apply any measure that is customarily applied by the courts in determining damages for breach of construction contracts.

Instead, in arriving at its decision, the Court concludes:

1. That the maximum amount of recovery is limited to \$10,008.70.

2. That the appellant was delayed 15 days on account of non-delivery of materials.

3. That the contract was completed 40 days late, and

4. That, therefore, appellant was entitled to recover 15/40ths of \$10,008.70, or \$3,753.15 as its damages.

Appellant contends —

1. That the amount of recovery is not limited to \$10,008.70.

2. That it was delayed 39 *days* in the performance of its contract, and

3. That the evidence establishes, under the measures usually adopted by the courts, damages in the amount of \$34,326.88.

For the most part these contentions present questions of law. As its Statement of Facts appellant adopts that part of the factual statement of the District Court con-

tained in the opinion (R. 60, 70, incl.) and its Findings of Fact (R. 89, 100 incl.) (with Record references added) which reads as follows:

Prior to this contract a general contract was entered into on March 25, 1942, and was designated as "Contract No. W461-eng-10274," between the United States of America and Wm. L. Lozier, Inc., Broderick and Gordon; it was what is known as a "cost-plus-a-fixed-fee" contract. It covered the erection of the Sunflower Ordnance Works near Kansas City.

On September 1, 1942, a subcontract, known as "F F Construction Subcontract No. 5," was entered into between Architect-Engineer-Manager, hereinafter designated as A-E-M, and W. E. Joslin, an individual of the City of San Francisco, California, doing business as Cory-Joslin and Macnsons, for the installation of the plumbing, heating and ventilating facilities at the Sunflower Ordnance Works. This contract was also a "cost-plus-a-fixed-fee" contract. Later the subcontract in question here was entered into between the appellant and appellee.

Leading up to this Subcontract, an invitation to bid was prepared by C. Howard Murphy, Manager of the Subcontract Department of the A-E-M. It consisted of a letter, with a copy of the specifications attached.

Bids were opened July 8. Appellant's bid was prepared and was submitted on July 8. Appellant, the low bidder, at \$448,000 lump sum bid, was awarded the contract on July 13. This bid covered only the cost of erection. All installation materials and equipment, of an approximate value of \$1,145,000, were to be furnished by the appellee, or by those with whom he was contracting, directly or indirectly. Notice to proceed was immediately mailed to and received by appellant on July 13.

As soon as the award was made to appellant the subcontract department of the A-E-M, through C. Howard Murphy, its manager, prepared a formal subcontract and mailed it to appellant for its signature on July 14. Appellant refused to sign the subcontract as prepared because it provided for completion in 120 days without including any provisions to compensate the appellant for damages if delay in performance should result from the shortages of materials. Several weeks went by during which the parties were negotiating in person and by letter with respect to an increase in cost if performance should be delayed, and with respect to a clause in the contract to protect appellant against damages in case of delay.

On August 3, (Ex. 7, R. 713) appellant wrote appellee that a predicted delay of six weeks would require an increase in the contract price to cover the following items:

Increase in actual costs.....	\$34,343.00
SSOA Bldrs. Risk Bond.....	1,888.00
Margin 15%.....	5,151.00

Total price adjustment on account of delay....\$41,382.00

On August 4, this proposal was given to the A-E-M. On the same date A-E-M advised appellee that no recommendation could be made for additional compensation at that time. (Ex. 8).

On August 8, (Ex. 9, R. 588) appellant submitted to appellee a letter requesting that there be appended to the signature sheet of the formal contract the following proviso:

“Water wall and roof boiler tubes, which were to have been furnished by the Constructor and available to the subcontractor immediately he was directed to proceed were not and are not as of date of contract

so available. This contract is above executed by the Subconstructor reserving full rights of recourse to claims for extension of time, and for reimbursement of such increased cost as may be occasioned by non-availability of these above mentioned materials, which were represented in bidding information to be at the site as of date of direction to proceed."

On August 17, appellee wrote appellant the paragraph suggested in appellant's letter of August 8 was not acceptable. (Ex. 11).

On August 22, (Ex. 16) appellant requested the appellee to state in a letter to appellant whether a claim for reimbursement of its increased costs would be valid or invalid under the terms of the contract submitted to appellant for signature if there should be proven to be:

(a) An increase in the subcontractor's cost because of delay in delivery of materials, if he prosecutes the work without due regard to economy in order to complete as early as possible; or

(b) An increase of the period of construction beyond 120 days, for the reason of delayed delivery of materials.

On August 31, (Ex. 18) appellee declined to write such a letter, but indicated that a contract might be approved with a proper reservation on the signature page. Thereafter, on September 11, 1944, there was added to the signature page of the formal contract, before the contract was executed, a clause which was initialed by all of the parties to the contract as follows:

"This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials notwithstanding the provisions of paragraph 1-05." (Ex. 2)

Performance commenced with the preparation of the inventory required under paragraph 5-04 (b). (R. 123). This inventory took more than eight weeks to complete. (Ex. 19, R. 124).

No verbal representation was made by anyone to appellant in respect to the tubes and headers, as to whether they were or were not in storage. The only representation in this respect is contained in paragraph 5-04(c) of the specifications wherein it is provided:

“Nearly all of the materials required for the work has been stored in Power House No. 1, or in warehouses adjacent thereto.”

By July 26, appellant had progressed to the point in the preparation of the field inventory where it appeared certain that there was a major shortage of materials, — tubes and headers — that would delay the progress of the work beyond the contract schedule of 120 days. (R. 132). Accordingly on that date appellant notified the appellee in writing of the shortages. (Ex. 4, R. 131). Appellee immediately referred this letter to the A-E-M which replied in a letter signed by J. S. Hagan, Chief Engineer, on July 29, that the shortage would not delay the work. (Ex. 6, R. 133).

On August 17, (Ex. 12, R. 165) and again on August 19, (Ex. 13, R. 166) appellant confirmed shortages of tubes and headers. At the same time these shortages were specifically called to the attention of Elmer Bennett, representative of the Combustion Engineering Company who had been sent to the job by his employer to expedite performance. (R. 164).

On August 19, appellant, through its representative Ralph Jung, suggested that appellant go on record with a letter stating certain facts encountered in installing water

wall tubes. (Ex. 14, R. 169). Such a letter was written on August 29. (Ex. 17, R. 169). On August 22, (Ex. 15, R. 180) appellant wrote appellee that certain water wall headers had been improperly manufactured and would be unfit for use under the contract.

Neither appellant nor appellee had any control over procuring any of the materials that the appellee was required to furnish. The tubes themselves were furnished by the Combustion Engineering Company, although manufactured by a steel or tube mill such, for example, as the Republic Steel Corporation, or the Globe Tube Company, or any one of a dozen similar mills. However, these tubes had been shipped to the Combustion Engineering factory where they were cut to length, bent to a definite shape and parts were welded on so as to make a complete unit of a tube to fit in a definite location in the boiler unit that was designed especially for the Sunflower Ordnance Project. In fact, the particular water wall tubes which were used at Sunflower were designed, manufactured and furnished by the Combustion Engineering Company under patents which were solely owned by that Company. There was no place else in the United States where these tubes could be obtained other than from the Combustion Engineering Company. (R. 163). It was not possible, therefore, for any of the contracting parties, or others, to go on the open market and purchase the tubes needed. They were manufactured for this particular unit or for units like it only by the Combustion Engineering Company.

The next step was to prepare a Schedule of progress, or construction schedule, for approval by the Contracting Officer of the Government. Appellant's original schedule was furnished prior to July 24, (R. 128, 129) but criticisms resulted in a revision on August 17, (R. 129) and it was approved on August 22. This schedule was brought up to

date each week. (Exs. 50 to 64, incl., R. 146). From this schedule the contracting parties were able to determine the exact date on which essential materials such as tubes and headers were required for the orderly prosecution of the contract. It was approved as reasonable by all of the parties concerned, including the Government and the appellee. (R. 147, 148, 193).

There were three units, identical in character, upon which identical operations were to be performed. The normal procedure followed by the plaintiff in the erection of such units was to do the work on unit one, then move to number two and repeat and then to unit number three. (R. 313, 314). The construction crew could work more efficiently on the second and third units due to increased familiarity with the exact operations required. (R. 318). The steps in which a contractor must proceed to attain maximum efficiency in the construction of these units are:

- (a) Line and place boiler drums in final position. (R. 152).

- (b) Install the tubes for the boiler proper and the water tubes.

- (c) Install the air heater tubes in a position back of the boiler, in a separate unit, so to speak.

- (d) Place a hydrostatic test on the boiler and water tubes.

- (e) Install the boiler brick work, insulation and casing.

- (f) Erect the pulverized coal burner and duct work.

- (g) Install drum internals and boiler appurtenances such as safety valves, steam gauges and water columns; install the instruments and combustion control, the sen-

sitive part of the work, such as small tubes, fittings and miscellaneous apparatus that control the function of the unit; install the recording instruments that record the steam pressure, steam temperature and the flue gas as it leaves the boiler; install the apparatus that controls the supply of coal to the unit, and the supply of air for combustion in proportion to the load or demand on the unit. (R. 153).

(h) The final phase is what appellant calls the "drying out" fire. A slow wood fire is put in the boiler and left for a week to dry out the insulation, the mortar that is in the brick work and in the jacket. At that time the oil and grease that has accumulated in the erection of the work is cleaned out so the boiler is entirely clean before it goes into service. This is followed by a period of adjustment, trial, inspection and operation. That was the sequence in operation.

In estimating for the bid on this job, appellant contemplated that the various operations would be done in sequence. (R. 155, 156). This method is recognized by all contractors and by manufacturer's representatives as being normal and orderly. The design of the unit as a whole by the builder is predicated on the assumption that it will be erected in a normal sequence of procedure. Such a method results in labor saving and time saving. (R. 156).

The only materials that it is claimed delayed the construction program were namely: The water wall tubes and water wall headers. (R. 174, 176 incl.; 180, 183, incl.; 369, 384, 387). Appellant's proposal and construction schedule, to meet the contract conditions required that these items were to be on the job and available for installation when needed. The installation of the water wall tubes should be done early in the erection program and their installation

must be completed before the erector can proceed with the hydrostatic tests, the erection of the boiler brickwork and casing, boiler piping, combustion control and boiler trim.

After being awarded the contract, and while taking inventory of the boiler materials, it was discovered that these shortages existed. No one employed by the appellee was aware of this shortage until after the contract had been awarded, although it was definitely known in the Engineering Department of the A-E-M. In the time allowed for the preparation of bid, it would have been impossible for any bidder to have determined by observation prior to the letting, whether or not there was a shortage of this material, because to have done so would have required the moving and handling of several hundred tons of materials and would have required much more time than was available. The only delay was occasioned by shortages of the water wall tubes and headers.

An inspection was made almost daily by representatives of the A-E-M and the Government. No complaint was made by these inspectors verbally or in writing to any representative of the appellant.

Claim for damages. The contract called for completion on November 10, 1944. (R. 121). It was actually completed on December 19, 1944. On February 21, 1945, appellant submitted a claim for damages in the amount of \$9,323.02 (Ex. 29, R. 208). On June 30, 1945, an amended claim for \$10,008.70 was presented (Ex. 35, R. 224). In each instance the claim enumerated only two items of damages, to-wit:

- (a) The increased cost of renting equipment.
- (b) The increased cost of supervisory personnel.

In each instance the claim did not include the following additional elements or items of damage that are now included in the complaint, to-wit:

- (a) Cost of 90 days extra time by Borst.
- (b) Home office overhead for 39 days.
- (c) Increased cost of labor, caused by delay in the delivery of materials.

On March 3, 1945, the appellee acknowledged receipt of the claim for \$10,008.70 and made no denial of appellant's right to damages in that amount and requested additional data. (Ex. 31, R. 214). On July 11, 1945, the appellee denied the claim, not on the ground that appellant was not entitled to damages, but on the ground that he was unable to determine the amount to which appellant was entitled. Specifically the appellee's letter reads:

“* * * Please be advised that Cory-Joslin & Macnsons has made a careful study of the facts stated in all of the foregoing letters, as a result of which Cory-Joslin & Macnsons is unable to determine, first, the actual number of days delay, if any, chargeable to the alleged delayed delivery of waterwall tubes and proper waterwall headers; second, the true and correct amount of your claim; and third, the part of your claim, if any, properly chargeable to the alleged delay of delivery of said materials.

“Accordingly, Cory-Joslin & Macnsons is herewith denying your claims and both of them in their entirety.” (Ex. 36, R. 230).

Appellant held the opinion, under the “disputes” provision of the contract, that it would be necessary to submit its claim to and obtain the opinion of the Chief of Engineers at Washington. Accordingly, the Government Contracting Officer made a detailed examination of the facts (Ex. 44, R. 251). These findings, with appellant's claim dated Sep-

tember 29, 1945, were forwarded to the office of the Chief of Engineers, Washington. On March 12, 1946, the Chief of Engineers ruled that he had no authority to pass upon the appellant's claim because it was a claim for unliquidated damages resulting from an alleged breach of contract which is recoverable in a judicial proceeding and not through administrative procedure. (Ex. 45)

On March 18, 1946, appellant was paid \$1,000.00 and receipted in full under its contract. Appellant accepted the \$1,000.00 and receipted in the following language: (Ex. 46)

"March 18, 1946. Power Service Corporation, 711 Wesley Temple Bldg., Minneapolis, Minn.

"Final payment on subcontract F.F. No. 5 to Government Contract No. W-461-Eng-10274 \$1,000.00.

"Payment in full exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision.

(Seal) POWER SERVICE CORP.,
P. C. GAFFNEY,
Treasurer."

On June 19, 1946, the present action was instituted.

Exhibits. All original exhibits have been brought up for the inspection of this Court by order of the District Court. (R. 113). Because of the number and nature of the exhibits, Judge Denman ordered that the printing of these exhibits be dispensed with, and that counsel be allowed to refer in the Record, Brief and Argument to the original exhibits. (R. 790)

IV.

SPECIFICATIONS OF ERRORS RELIED UPON.

The errors relied upon and intended to be urged by appellant are that the District Court erred:

1. In awarding appellant damages in the amount of Three Thousand Seven Hundred Fifty-three & 15/100 Dollars (\$3,753.15) instead of in the amount of damages established by the evidence, to-wit, the sum of Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88).

2. In its Findings of Fact No. 32 holding that appellant was delayed only two days on Boiler No. 1, instead of sixteen days as shown by the evidence.

3. In its Findings of Fact No. 33, holding that appellant was delayed only seven days on Boiler No. 2, instead of thirty-eight days as shown by the evidence.

4. In its Findings of Fact No. 34, holding that appellant was delayed only six days on Boiler No. 3, instead of forty-four days as shown by the evidence.

5. In its Findings of Fact No. 35, holding that appellant was delayed a total of only fifteen days in completing its contract, and in the court's failure to find from the evidence that the appellant was delayed from November 10, 1944, to December 19, 1944, a total of thirty-nine days.

6. In its Findings of Fact No. 39, in which the court arbitrarily determined that the loss to appellant amounted to Two Hundred Fifty & 21/100 Dollars (\$250.21) daily, and in its failure to find from the evidence that the total damages amounted to Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88) made up of the following distinct and clearly established items of damages, to-wit:

Item 1: Extra cost of equipment rental.....	\$2,255.50
Item 2: Extra cost of Supervisory personnel (except Borst).....	8,267.53
Item 3: Extra cost of 90 days additional time and expense — Borst.....	2,542.31
Item 4: Home Office overhead.....	6,649.82
Item 5: Loss in Efficiency.....	14,611.72
	<hr/>
	\$34,326.88

7. In its Conclusion of Law No. 5 insofar as the court held that appellant's damages were limited to the amount set forth in its amended claim.

8. In its Conclusion of Law No. 6, holding that appellant could not recover in excess of \$10,008.70, being the amount specified in its original claim dated June 30, 1945 (Plaintiff's Exhibit 35).

9. In its Conclusion of Law No. 7, holding that appellant could not recover on any element of damages not included in its claim of June 30, 1945.

10. In that part of its Conclusion of Law No. 9, which held that appellant was entitled only to recover damages in the amount of Three Thousand Seven Hundred Fifty-three & 15/100 Dollars (\$3,753.15), instead of Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88), as established by the evidence.

11. By disallowing, in its computation of damages, all overhead expenses established by the evidence, to-wit, the sum of Six Thousand Six Hundred Forty-nine & 82/100 Dollars (\$6,649.82).

12. In that its opinion and decree are not supported by evidence and are contrary to law.

13. In that its opinion and decree are not supported by its Findings of Fact.

14. In that its opinion and decree are contrary to its Findings of Fact and the law.

15. In that its decree as to the amount of delay and the measure of damages is clearly erroneous and is not based upon substantial evidence.

V.

SUMMARY OF ARGUMENT.

1. Damages may be recovered in excess of the claim originally filed.

2. The court is bound by the Contracting Officer's Findings of Fact on the question as to the amount of the delay.

3. Independently of the Contracting Officer's Findings of Fact the record affirmatively shows clearly that the appellant was delayed thirty-nine days.

4. The court failed to apply the correct measure of damages.

VI.

ARGUMENT.

A. **Preliminary Questions.** (1) **May appellant recover in excess of \$10,008.70?** The principal issue before the Court is the amount of damages to which appellant is entitled on the record. At the threshold of this question, however, we encounter the preliminary question — "Can damages be recovered in excess of the claim originally submitted by appellant on June 30, 1945?" (Ex. 35, R. 225). The answer to this question is "Yes." That part of the appellee's Answer, based upon the receipt of March 18, 1946, (Ex. 46, R. 205), which raises this issue, reads as follows:

“That said plaintiff is barred by:

- (a) Estoppel
- (b) Release
- (c) Statute of frauds
- (d) Waiver”

That is all! This does not appear to be the proper method of pleading a release (Moore’s Form 8.107), the statute of frauds (Moore’s Form 8.109) or waiver or estoppel (Moore’s Form 8.112). See also Moore’s Federal Practice, Vol. 1, p. 567, *et seq.* Perhaps a motion for a more definite statement and for a bill of particulars on these “affirmative defenses” would have been the proper course for appellant’s counsel to take. *Bushwick v. Ford Motor Co.*, 1 FRD 19. Or, a motion to strike, *Nordman v. Johnson City*, 1 FRD 51. But that course might have delayed the trial. This pleading gives indication that counsel for appellee had before them Rule 8(c), Rules of Civil Procedure, 28 USCA following Sec. 723c, and merely picked out these elements as possible defenses.

There is absolutely no testimony in the record — not a single paragraph — in support of any of these affirmative defenses. For example:

1. **Estoppel.** This affirmative defense appears to be based upon the belief that appellant is estopped to claim damages in the amount of \$34,343.00 because on June 30, 1945, appellant submitted its claim originally in the amount of \$10,008.70. On March 12, 1946, the Chief of Engineers ruled that he had no authority to pass upon appellant’s claim. On March 18, 1946, appellant received the balance due for performance of the contract and gave a receipt which reads:

“Final payment of Subcontract FF #5 to Government Contract #W-461-eng-10274, \$1,000.00. Payment

in full exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision." (Ex. 46, R. 204)

Appellant's action in excluding its outstanding claim does not present a single element of equitable estoppel. There was no false representation made, no concealment and certainly there was no showing that the appellee altered his course or conduct because of the presentation of the claim or because of the execution of this receipt. Quite the contrary. The elements of estoppel are enumerated in *Coen v. American Surety Co.*, 120 F. 2d 393. At l. c. 398:

"The essential elements of an equitable estoppel stated by the Supreme Court of Missouri in *Blodgett v. Perry*, 97 Mo. 263, 10 S. W. 891, 892, 10 Am. St. Rep. 307, and in similar cases are: '(1) There must have been a false representation or a concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; (5) the other party must have been induced to act upon it.' See also *Bigelow*, *Estoppel*, 3d Ed., 484; *Sanders v. Chartrand*, 158 Mo. 352, 59 S. W. 95, 97; *Grafman Dairy Co. v. Northwestern Bank*, 315 Mo. 849, 288 S. W. 359, 363. In the last cited case the court said: 'Estoppel must be pleaded with particularity and certainty. * * * nothing can be supplied by inference or intendment, and where there is ground for inference or intendment, it will be against and not in favor of the estoppel. * * * the burden is on the party who sets up the estoppel to make out the facts on which it rests.' "

2. **Waiver.** Certainly there was no "waiver" by appellant when it expressly reserved its right to claim dam-

ages. In *McDanel v. General Ins. Co.*, 36 Pac. (2d) 829 (1 Cal. App. 2d 454) waiver is defined at l. c. 832:

“To constitute a waiver there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege — an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded or insisted upon. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. 25 Cal. Jr. 926-928.”

3. **Release.** Certainly, it cannot be successfully claimed that the above-described receipt constituted a release of appellant's claim. There was no consideration to support a release. *Cuneo Press v. Claybourn Corp.*, 90 F. 2d 233, 235.

4. **Statute of frauds.** Frankly, we can see no occasion for the application of this defense under the facts disclosed by the evidence.

And, finally, it is crystal clear that appellee only paid the amount to which it is conceded appellant was entitled under its contract. Under any view of the case, therefore, the payment of the \$1,000.00 would not be a consideration for the release of any claim which appellant might have against the appellee, whether it be for \$10,008.70 or for \$34,343.00. *Alaska Packers' Assn. v. Domenico*, (9 CCA) 117 F. 99, 102.

(2) **Is the Court bound by the Contracting Officer's Findings of Fact?** It has so been decided by the Federal

courts time and again. In *Evans Electrical Const. Co. v. Wm. S. Lozier, Inc., et al*, 68 F. Supp. 256, at l. c. 263:

"The evidence in this case clearly establishes that the disputed question of fact arising under the subcontract in question has been submitted by the parties to the Contracting Officer and finally determined in favor of the plaintiffs by the said officer and the Chief of Engineers of the United States Army. The decision of said officers, concerning such question of fact, is conclusive and binding on this Court. *Plumley v. U. S.*, 226 U. S. 545; *Merrill-Ruckgaber Co. v. U. S.*, 241 U. S. 387; *U. S. v. John McShain, Inc.*, 308 U. S. 512; *English Const. Co. v. U. S.*, 43 F. Supp. 313; *Stiers Bros. Const. Co. v. Broderick, et al*, 60 F. Supp. 792; *Rego Bldg. Corp. v. U. S.* 99 Ct. Cl. 445; *R. C. Huffman Const. Co. v. U. S.*, 100 Ct. Cl. 80. No fraud or bad faith on the part of either of such officers, in the making of said decisions, is alleged or shown in the evidence. The Contracting Officer and the Chief of Engineers of the United States Army have determined that it was the intention of the parties to the subcontract in question that Mr. Carlisle was to be employed as Project Manager, and that his salary, at the rate of \$9,000 a year, should be and is a reimbursable item of cost under said contract. The defendant concurred in such decision. The defendants did not change their position concerning such fact until after they were ordered, by the Contracting Officer in this case, to reimburse plaintiffs for the amount of the salary paid by them to Mr. Carlisle."

The Contracting Officer found as a fact (Subpar. 9, Ex. 44, R. 262) that as to Boiler No. 2 the appellant was delayed from September 5 to September 20 (15 days) plus the period from September 26 to October 18 (22 days), being a total of 37 days delay. The Contracting Officer found as a fact (Subpar. 10, Ex. 44, R. 263) that as to Boiler No. 3 the appellant was delayed from August 15

to September 26, a period of 42 *days*. He also found, (Subpar. 11, Ex. 44, R. 263):

“The appellant has the reputation of being a very efficient operator. That firm was regarded by responsible engineers on this job as having performed the work of completing the power house in a very efficient manner. It is found that at the time the tube shortage was discovered the appellant altered its proposed method of operations and paced its work so as to eliminate actual work stoppages. This tends to give the appearances on the progress chart of the job (Exhibit B) that delays in the delivery of tubes and delays caused by misfit headers might not have been the sole reasons why the work was not completed in one hundred twenty days. However, the appellant very probably would have completed the work within one hundred twenty days had all necessary materials been on the job.”

We believe, under the authorities above cited, and by virtue of the express terms of the contract between the parties (Art. VI, R. 27) that these Findings of Fact are binding on the Court. We believe it is equally well settled that the Court is not bound by the Contracting Officer's conclusions of law.

(3) **Amount of delay.** Independently of the Contracting Officer's Findings of Fact, does the record affirmatively show that the appellant was delayed 39 days? Appellant thinks it does so show. The District Court finds that the appellant was delayed as follows:

On Boiler No. 1	2 days (No. 32, R. 103)
On Boiler No. 2	7 days (No. 33, R. 104)
On Boiler No. 3	6 days (No. 34, R. 104)
—	
	15 days

We assert that these Findings of Fact are not supported by any substantial evidence in the record. They are contrary to the record. The following illustrations show these Findings to be clearly erroneous:

Illustration No. 1: The Court found, as to Boiler No. 1, that appellant was delayed two days on account of *non-delivery of water wall tubes and headers*. (No. 32, R. 103). After stating that the evidence supports the fact that appellee was advised that these materials would be needed on *August 1*, and the appellee having admitted (R. 598) that they were not received until *August 17* (16 days late), the Court found that Ex. 17 (being the letter of 8-29-44, R. 170) disclosed the "first delay of one or two days." The Court completely misconstrues Ex. 17. It construes Ex. 17 as a statement of when delay started on account of *non-delivery of the water wall tubes and headers*. But this was not the purpose of that letter. The sole purpose of Ex. 17 was to establish when delay started on account of the *misalignment of the headers*. This purpose was established by direct evidence. (R. 169). And, in Ex. 17-A (R. 171), a diagram of the *misalignment of the headers* was offered and received in evidence. (R. 174).

What does the evidence in the record establish as to the amount of delay occasioned by the *non-delivery of the water wall tubes and headers*? It is a fact that the water wall tubes for Boiler No. 1 were required on August 1, 1944 (Ex. 4, R. 167) and the Court so found. (No. 32, R. 103). They were received on August 17, (R. 160). That means they were received 16 days late. The record further shows (R. 161) that Boiler No. 1 was scheduled for completion on August 23. The actual completion date was September 8 (R. 599) — 16 days late. The record, therefore, clearly shows that water wall tubes and headers for Boiler No. 1 were furnished *16 days late*, and the work was

completed 16 days late, and the Court's finding that there was only two days delay, therefore, is clearly erroneous, and is not based upon substantial evidence.

Illustration No. 2. The Court found that appellant was delayed 7 days on Boiler No. 2 (No. 33, R. 104). This finding is not supported by the evidence. Under the Court's own Findings of Fact, if correctly computed, the delay was 38 days — not 7 days. There is an error of 31 days in the computation. Finding No. 33 concedes that the water wall tubes were required August 8, that the production chart (Ex. 62) shows that the appellant proposed 42 days for completion and that it was practically complete on October 27. The correct computation follows:

The production chart required appellant to com-	
mence	8- 8-44
Add: 42 days (1 mo. 12 days to complete)	1-12-0
	<hr/>
Completion date, according to production chart	9-19-44
Actual completion date per Court's finding	10-27-44
	<hr/>
Delay	1 mo 8 days
	(38 days)

Even if the Court's premises were correct (which they are not), the conclusion that appellant was delayed 7 days is wholly illogical. The Court declares that if appellant had maintained its schedule of 2.38% per day, it would have completed the work on October 20; that it completed the work on October 27, and that, therefore, appellant was delayed 7 days! This is the equivalent of declaring that—

Appellant should have completed the work on	October 20
It actually completed the work on	October 27
	<hr/>

Therefore, the Court allows appellant damages for

7 days

— because the appellant didn't do what it should have done, to-wit, maintain its schedule of 2.38% per day. In other words, the Court allowed 7 days damage, as to Boiler No. 2, not because the appellee failed to deliver the materials in time, but because appellant didn't do what it should have done!

Furthermore, the Court's computation that from July 20 to September 3 is 42 *days*, is quite inaccurate. It is actually 45 *days*. Not that it makes any difference in this case, except to point out how completely inaccurate are the Court's findings.

Illustration No. 3. The Court's finding on Boiler No. 3 (R. 104), that appellant was delayed 6 days, is equally erroneous. Apparently this finding is based upon appellee's testimony at R. 600, which reads:

"On boiler No. 3 they show forty-five calendar days to complete between July 25th and September 6th, an average of 2.22 per cent completion for each calendar day. The actual record is that there was seventy-one days and an average of 1.41 per cent completion per calendar day. The water-wall tubes were delivered on September 20th. The headers were delivered September 26th, on which dates, or rather, on the 26th their schedule shows 58 per cent completion, and following their schedule of an average of 2.22 per cent completion per calendar day, they should have been, —

"Q. (Interposing): That was their estimate?

"A. Their proposed construction schedule. They proposed to accomplish that from July 25th to September 6th, and on September 26th, which was the date the water-wall tubes and headers had been delivered, — following their own construction schedule they would have been completed on October 14th. They actually completed October 20th, which was also six days late."

Appellee's testimony (*supra*) shows that Boiler No. 3 was scheduled for completion on *September 6*. This is the date shown on the construction charts, Exs. 52-64, incl. Appellee concedes that this work was actually completed on October 20 (R. 601). According to our computation, based on the appellee's testimony, the completion of the work on Boiler No. 3, was delayed 44 days, computed as follows:

Date of actual completion.....	10-20-44
Construction schedule called for completion on....	9- 6-44
<hr/>	
Delay	1 mo 14 days (44 days)

Or, if we take the most favorable construction that could be given to this testimony, to-wit, that appellant should have completed on October 14, the correct computation would be:

Date on which appellant should have completed.....	10-14-44
Date on which construction schedule called for completion	9- 6-44
<hr/>	
Delay.....	1 mo 8 days (38 days)

The point about each one of these illustrations is that the Court's Findings of Fact are wholly inaccurate under the record evidence and its conclusions are not based on substantial evidence. On the assumption that it has been demonstrated that the Court's findings are clearly erroneous and are not based upon substantial evidence, we shall now refer to the record evidence which establishes that the delay amounted to 39 days.

The Court finds as a fact that the contract called for completion on November 10, 1944, and that it was actually completed December 19, 1944. (R. 69, 98). The difference between these two dates is 39 days. Appellant's testimony

(R. 203) was to the effect that this entire delay of 39 days was caused by the appellee's failure to furnish the water wall tubes and headers on the date called for on the construction schedule. There is no dispute as to the dates provided for in the construction schedule, a schedule required by the contract between the parties. (R. 127).

This schedule provided for the delivery of the water wall tubes and headers as follows:

For Boiler No. 1	August 1	(R. 139)
For Boiler No. 2	August 7	(R. 139)
For Boiler No. 3	August 15	(R. 139)

Appellant's evidence shows that delivery was made as follows:

For Boiler No. 1	August 17	(R. 195)	16 days delay
For Boiler No. 2	September 20	(R. 162, 190)	43 days delay
For Boiler No. 3	September 26	(R. 162, 195)	41 days delay

Appellee's evidence shows that delivery was made as follows:

For Boiler No. 1	August 17	(R. 598)	16 days delay
For Boiler No. 2	August 20	(R. 599)	13 days delay
For Boiler No. 3	September 26	(R. 600)	41 days delay

The Contracting Officer's Findings of Fact show:

For Boiler No. 1	August 17	(R. 262)	— no delay
For Boiler No. 2	September 20	(R. 262-3)	— 37 days delay
For Boiler No. 3	September 26	(R. 263)	— 41 days

Thus it abundantly appears from the evidence that the delay on these separate segments of work range from 16 days to 43 days. All parties agree (*supra*) that delivery

on Boiler No. 3 was 41 days late. However, we cannot arrive at the overall delay by adding up the number of days delay on each separate item, as the Court does in its Finding No. 35 (R. 105). The decisive question is how much did appellee's failure to furnish these materials within the time designated in the construction schedule delay the completion of the entire project? Appellant's testimony shows that the delays occasioned by the non-delivery of materials were unreasonable, (R. 201) and that if it had not been for those delays the contract could have been completed on November 10, but that on account of the delay it was not completed until December 19 — 39 days late. There is no substantial testimony in the Record to the contrary. (R. 203).

Appellee attempts to minimize the damages by showing that appellant was not efficient because it failed —

1. To perform at the rate provided for in its "S" curve on the construction schedule.
2. To hire additional employees as the materials arrived.

There are at least two sufficient answers to the attack on appellant's efficiency of operation.

Answer 1. Appellee introduced Exhibits P to W, inclusive, to establish the "inefficiency of appellant" or to establish that it did not perform its work at the same rate provided for in the construction schedule. In every instance to which he testified as to appellant's "inefficiency," his statements were based upon a false premise. An "S" curve chart was received in evidence as Ex. 71 (R. 762). Please see.

The Court will observe from this chart that the percentage of performance per day is very low for the first

few days. Then the rate per day becomes much higher until near the end when the percentage of performance per day again is low. In other words, all along the "S" curve the rate of percentage of performance varies. It is never constant. Rate of performance does not follow, in engineering parlance, a "straight line curve" represented on this chart by the dotted line AB.

Nevertheless, in each instance where appellee called the Court's attention to the appellant's "inefficiency," he testified to the percentage per day that appellant would be required to perform by following a "straight line curve." This he admitted on cross examination. (R. 762).

The point is that the *average rate of performance* used each time by appellee in estimating time of performance is *not the time allowed by the construction schedule*, which all parties agreed was a reasonable schedule. The difference between the time allowed for completing various sections of the work according to a "straight line curve" and according to the "S" curve, is illustrated by the following chart based upon appellee's testimony.

Joslin's				
Record	Section of work	Percentage of work to be done	testimony — "straight line curve"	Actual time allowed by "S" curve
758	Brick work on Boiler #2	62	11	19
759	Brick work on Boiler #3	82	11	25
761	Ash hopper Boiler #2	75	3	5
761	Ash hopper Boiler #3	95	4	7

Since in each instance appellee commenced his argument on a false premise his conclusions as to appellant's efficiency can hardly be said to be reliable. This unreliability of the appellee's testimony is underlined by the record evidence that the appellee was at the site of the performance for only a few days and he never inspected appellant's work a single time from the beginning to the end of the performance.

Answer 2. There is no testimony in the record to support appellee's contention of inefficiency. The record contains the testimony of at least ten witnesses who were directly involved in the performance of this contract. Not a single witness criticized appellant's rate or quality of performance. Each of these witnesses testified for and in favor of the appellant. Appellee was personally present at the taking of some of the depositions of these witnesses. However, not a single question was asked of any of the witnesses about appellant's efficiency of performance. The testimony is all one way. The "Findings of Fact" by Major Thomas sums up his investigation (R. 264) in these words:

"The appellant has the reputation of being a very efficient operator. That firm was regarded by responsible engineers on this job as having performed the work of completing the power house in a very efficient manner. It is found that at the time the tube shortage was discovered the appellant altered its proposed method of operations and paced its work so as to eliminate actual work stoppages. This tends to give the appearances on the progress chart of the job (Exhibit B) that delays in the delivery of the tubes and delays caused by misfit headers might not have been the sole reasons why the work was not completed in one hundred twenty days. However the appellant very probably would have completed the work within one hundred twenty days had all necessary materials been on the job."

In reviewing the question of damages, we wonder if it has occurred to the Court that appellant furnished to the Trial Court, aside from the testimony of its own employees, the testimony of witnesses who have absolutely no connection with or obligation to the appellant. Consider this chart:

No. Name of Witness	Employer of Witness	Capacity in which Employed
1. Frank V. Wedlick	Cory-Joslin & Macnsons	Project Manager
2. Col. E. E. Taylor	U. S. Government	Contracting Officer
3. Maj. Homer D. Thomas	U. S. Government	Contracting Officer
4. Delbert C. Smith	Hercules Powder Co.	Power Division Engineer
5. Eustice C. Clay	Hercules Powder Co.	Chief Expediter
6. C. Howard Murphy	A-E-M	Contract Department
7. Lawrence J. Neubauer	A-E-M	Mechanical Engineer

Not only did each one of these witnesses testify in favor of the appellant on the disputed issues, but they testified, where qualified, on the matter of damages. Yet counsel for the appellee developed absolutely no testimony from these witnesses, one of whom was employed by the appellee, about appellant's efficiency, or about the question of damages.

Furthermore, has it occurred to this Court that the only testimony of any character offered in opposition to appellant's claim is that of the appellee himself who, according to his testimony, was only on the job *two times* during the entire time of performance. Let us compare the time of performance with the time the appellee was on the job as disclosed by his own testimony:

Total time of performance.....159 days

Time spent by Joslin on the job:

First time, August, 1944 (R. 712)..... 14 days

Second time, December, 1944 (R. 713)
.....7 to 14 days

He never talked to Borst from the day performance commenced until the day performance was completed. (R. 713, 714) Appellee's opportunity for observation, to say the least, was rather limited. Not much weight should be given his testimony as against the testimony of the seven non-interested witnesses named above. Our view is that the testimony on all issues was overwhelmingly in favor of the appellant.

B. Principal question at issue — Measure of damages.

This brings us to the principal question at issue, to-wit: How much was appellant damaged? The determination of the amount of damages in this case, taken as a whole, at first appears to be a complex problem. The Trial Court's Finding of Fact No. 30 declares that it is a difficult question to determine (R. 103). However, by breaking up the elements of the damages into their component parts it is not difficult of accurate computation. The proof submitted five distinct items of damage, to-wit:

Item 1: Extra cost of equipment rental.....	\$ 2,255.50
Item 2: Extra cost of Supervisory personnel (except Borst).....	8,267.53
Item 3: Extra cost of 90 days additional time and expense — Borst.....	2,542.31
Item 4: Home Office Overhead.....	6,649.82
Item 5: Loss in Efficiency.....	14,611.72
TOTAL DAMAGES.....	\$34,326.88

See Ex. 65, R. 267 to 330.

The general rule is that a contractor may recover damages incurred by reason of delay. The measure of damages occasioned by delay constituting a breach of the contract includes *all expenses and costs incurred by reason of delay*. The court in *Phoenix Bridge Co. v. United States*, 85 Ct. Cls. 603, l. c. 628, said that:

“It is well settled that where a contractor is delayed by the Government in the prosecution of work under a contract he is entitled to recover as damages the expenses incurred by reason of such delay which would not otherwise have been necessarily incurred.”

In *Rust Engineering Co. v. U. S.*, 86 Ct. Cls. 461, recovery was allowed for extra costs incurred by reason of delay by the Government, *but recovery was limited to costs incurred without profit*. Please read at l. c. 466, 468, Findings of Fact 7 and 8. At l. c. 476:

“The decisions are uniform that a contractor may recover damages and extra costs directly attributable to and occasioned by delays caused by the defendant by reason of conditions encountered materially differing from those specified and contemplated by the drawings and specifications. The present claim comes within this rule.”

The Court will observe that it was necessary for appellant to establish that the delays encountered were not merely the usual delays that are ordinarily encountered in the performance of any contract of this character, but that they were unreasonable delays. This fact was established (R. 202, 203).

Before we enter into a discussion of each element of damages, the Court should bear in mind that appellee knew within less than a month after performance commenced that there would be a delay of approximately 42 days, and that damages would be claimed in the amount

of \$41,382.00. This is so because when appellant learned of the material shortages, it wrote a letter to the appellee on August 3, 1944 (Ex. 8, R. 91) giving notice that the delay in furnishing materials would delay final completion 42 days, and requested an addition to the contract price as follows:

Increase in actual costs (itemized).....	\$34,343.00
SSOA Builder's Risk bond.....	1,888.00
Margin 15%.....	5,151.00
<hr/>	
Total requested increase in contract price.....	\$41,382.00
For full details of this letter see Ex. 7.	

Appellee not only knew that appellant estimated that the extra cost on account of this delay would be \$34,343.00, (*supra*) but he knew that a claim for damages would be submitted because of the delay. Appellee even attempted to get the A-E-M to cancel the contract with appellant and award it to him, the appellee. See appellee's letter to the A-E-M of August 12 (Ex. 10A, R. 719), which reads:

"We note in our files the request of the Power Service Corporation for additional fee in the amount of \$41,382.00 claim for delays because of material shortages. It is the belief of the writer that material shortages will develop throughout the life of the Power Service Corporation's contract, and these shortages will remain a constant source of controversy of claims filed by the Power Service Corporation.

"We believe that it would be to the benefit of the Government and all parties concerned if legal steps were taken to compensate the Power Service Corporation for costs expended, together with a reasonable profit allowable by the Government, and cancel their contract, and complete Power House No. 1 with

our own forces. By so doing we will avoid possible future claims and litigation that might develop should this contract remain in force."

Furthermore, the Court should bear in mind that when the appellant originally submitted its claim for damages on account of this delay, through administrative channels, it expressly eliminated certain elements of damages (Ex. 29, R. 212) and asked only for the sum of \$9,323.02 (later this was increased to \$10,008.70, Ex. 35). However, when administrative relief was denied and when the appellee refused to pay any damages, the appellant filed this suit in which it now asks that its full legal damages be awarded.

Now let us consider each item of damage separately.

Item 1: Extra cost of equipment rental, \$2,255.50. This element of damages is properly allowable under the decision of *Brand Investment Co. v. U. S.*, 58 F. Supp. 749. Because of the Government's stop order, plaintiff incurred the following expenses or damages:

Pay-roll expenses of superintendent, assistant superintendent, stenographers, watchman, and common labor and caring for premises.....	\$1,554.99
Rent of office and purchase of materials and supplies to protect the premises during the period of the stop order.....	356.95
Expenses in connection with resumption of operations	182.70
Rental value of equipment, discounted because of nonuse	2,915.75
Main office overhead.....	1,071.47
Workmen's compensation, public liability and damage insurance.....	132.76
Total	<u>\$6,215.62</u>

At l. c. 751 we find:

“The remaining questions in the case have to do with some items of alleged damages. The plaintiff asks for a part of the cost of maintaining its main office during the period of the delay, proportionate to the relation which this contract bore to the total amount of all of its then current contracts, plus a large additional amount to compensate for the fact that its executives devoted more than a proportionate part of their time to attempts to get the New Castle job under way again during the period of the stop order. The Government urges that nothing should be allowed for main office expenses, since it goes on regardless of what is happening on any or all of the contractor’s jobs.

“We are allowing the plaintiff a proportionate part of its main office overhead. While such an element of damage can never be proved with mathematical precision, it is standard accounting practice to attribute main office expense to various company operations on some fair basis and we follow that practice. While it is probable that the plaintiff’s executives did devote more than a proportionate part of their time to the New Castle job during the period of the stoppage, the amount of the excess has not been proved with measurable definiteness.

“The other disputed element of damage is the rental value of machines and equipment which the plaintiff had on the job, and which were necessarily kept idle during the period of the stop order. The plaintiff proved that machines of this type had a certain rental value. The Government urges that the plaintiff was not in the business of renting machines to others; that it would, probably, not have rented them even if they had not been tied up on this job by the indefiniteness of the duration of the stop order; that it has not shown that it had any other job on which it could have used them itself if they had not been tied to this job.

"We think that the plaintiff is entitled to recover on this item of its claim. We do not allow the full amount of the rental value, since we recognize that, if rented the machines would have suffered wear and tear which they did not suffer while idle on this job. But when the Government, in breach of its contract, in effect condemns a contractor's valuable and useful machines to a period of idleness and uselessness, we think that it should make compensation comparable to what would be required if it took the machines for use for a temporary period, but did not in fact use them. As a jury verdict, we allow the proved rental value, discounted by one-half because of the absence of actual use with its resulting wear and tear. We think that the contrary view expressed by the court in *Phoenix Bridge Company v. United States*, 85 Ct. Cl. 603, 631, should not be followed."

The courts of California allow damages on this item. *Milovich v. Los Angeles*, 108 P. 2d 960, 966-7.

Appellant's testimony on this item of damages appears at pp. 267, 275 of the Record and in Exhibit 65, item 1. It was necessary that all of this equipment remain on the job during the period appellant was delayed—to-wit, 39 days. (R. 274). It was used during this period. (R. 274). The prices were reasonable (R. 273) and were in line with OPA Regulations (MPR 134, Ex. 70, R. 398) of which the Court will take judicial notice. (R. 271). Invoices showing the actual payment of each separate item of damage were offered in evidence. Exs. 32-1, 32-2, and 32-3. (R. 274) Frankly, we do not believe that under the evidence and the law, any part of this item of damage can be seriously questioned. It had never been questioned prior to the trial. We believe the record entitles appellant to recover on this item.....\$2,255.50

Item 2: Extra cost of supervisory personnel (except Borst) \$8,267.53. In McCloskey v. U. S., 66 Ct. Cl. 105, at l. c. 128:

"It is insisted that the plaintiff could not go on with the contract when it found that defendant would not prepare the site within the time agreed upon and thereafter bring suit for damages, but we know of no such rule. It may be that plaintiff could have elected to cancel or abandon the contract, but it also had the right to perform its part of the contract and claim damages for the defendant's failure on its part, provided, of course, there was no acquiescence in this failure on the part of the plaintiff, and the evidence shows abundantly that this did not occur.

"*Crook Co. v. United States*, 59 C. Cls. 593, is cited as supporting the contention of the defendant on this point. Some of the language in the opinion, as quoted in the brief of counsel for defendant, standing by itself, might justify such an inference, but when the case was appealed to the Supreme Court (270 U. S. 4) neither this language nor anything with the same meaning is repeated in the opinion. The case was affirmed, but it was on the ground of peculiar provisions in the contract. This court and the Supreme Court have repeatedly held that a contractor may recover the damages he has incurred by reason of delay wrongfully caused by the Government. See *Crook Co. v. United States*, 59 C. Cls. 348; *Goldstone v. United States*, 61 C. Cls. 401, and cases cited.

"The evidence on the whole may be summed up by saying that the agents acting for the Government paid no attention to the verbal contract to have the site cleared on July 1, 1919, and were careless as to the performance of the provisions of the written contract with reference to how the site should be cleared.

"Having found that the defendant was responsible for the delay in clearing the site and the failure to clear in the manner required by the contract, it be-

comes necessary to determine the amount that plaintiff was damaged thereby. * * *

"The evidence shows that if the site had been properly cleared at the time agreed upon, the contract could have been completed within the estimates placed on the several branches thereof by the plaintiff at the time the bid was made. This was proved in many cases by the actual offers of subcontractors who in some instances made a bid of an amount less than that fixed by plaintiff in the estimates. The damage or loss of the plaintiff was what he was compelled to pay over and above the cost and expense which would have been incurred had he been able to commence and proceed with the work in regular order upon a site prepared in the manner specified in the contract and ready at the date agreed upon. The total amount to be recovered by plaintiff will include not only the extra amount paid for work and material, but also the amount deducted from the contract price by defendant in making payment on account of damages for delay; the amount of the judgment obtained against plaintiff by the Special Service Flooring Corporation for delay caused by reason of the failure to furnish heat which the defendant had agreed to supply; for additional premium on the bond; additional payment for liability insurance; the additional amount paid for overhead and superintendents; and the cost of the overseer furnished by the bonding company, which by its contract with that company the plaintiff was obliged to pay; but the plaintiff will not be allowed anything for profit which it might have made as that sum was included in the contract price which, under the judgment to be rendered herein, it will receive together with the damages caused by delay."

The testimony on this item of damages may be found in the Record at pages 274, 279, and in Ex. 65, item 2. Exhibit 65 is more or less self-explanatory. This item of damage represents extra expense incurred by appellant during the 39-day period to keep the supervisory per-

sonnel on the job. These employees were entirely separate and independent of the appellant's labor organization. (R. 276). They were required to be on the job during the entire period of time. (R. 276). Wages, actually paid, together with Social Security taxes and expenses that were reimbursed to these men, amounted to \$8,267.53. This was additional expense to which appellant was put on account of the 39-day delay and is another item of damage as to which there should be no question of allowance by the Court. Under the law and the evidence appellant is entitled to, and the Court should allow, damages on this item in the amount of _____ \$8,267.53

Item 3: Extra cost of 90 days additional time and expenses of Borst, \$2,542.31. The right to the recovery of this element of damage was in question in the case of *Grand Trunk Western R. Co. v. Nelson*, 116 F. (2d) 823. See citations under Item 4.

The testimony on this item of damages may be found at pages 279, 284 of the Record, and in Ex. 65, item 3. The damage to appellant under this heading was real and substantial. Borst was charged with the entire responsibility of getting and performing construction contracts of a highly specialized type. While he is not an officer of the corporation, he has the responsibility of a General Manager. (R. 306, 307) No serious effort was made by counsel for the appellee to eliminate this item of damage. From the record it appears certain that had it not been for the delay in securing materials, and the consequent confusion on the Sunflower Ordnance contract, Borst would not have been required to spend 159 days on this contract. On account of these material shortages he was required to spend 90 days extra time on the job — time which otherwise he could have devoted to other business activities for the appellant. (R. 281, 282) During this 90-day period the ap-

pellant was required to pay him his salary and expenses for work that otherwise would not have been necessary. Instead, if there had been no delay, Borst could have spent that 90 days in productive work for the appellant at its home office. This item of damages is clear and was established with certainty. See the computation in Ex. 65, Item 3. This item should be allowed in the amount of \$2,542.31

Item 4. Home Office Overhead, \$6,649.82. In *Grand Trunk Western R. Co. v. W. H. Nelson Co.*, 116 F. 2d 823, at l. c. 838:

“Appellee claimed \$47,090.89 as overhead expenses in its schedule of losses which was submitted to the jury. Appellant insists that this item was not a proper element to be considered in measuring damages. Salaries of appellee’s executive officers made up approximately one-half of the item, and there was included in it \$8,500 for entertainment of prospective customers, \$2,541.95 for maintaining a storage yard at Chillicothe, Ohio, \$8,536.93 for traveling expenses and \$5,605.05 under the heading ‘sundries.’

“In computing damages for breach of a construction contract, overhead expenses may be considered. These are not definable with precision but may be said to include broadly, the continuous expenses of the business, irrespective of the outlay on a particular contract. *McCloskey v. United States*, 66 Ct. Cl. 105; *State of Indiana v. Feigle*, 204 Ind. 438, 178 N. E. 435. The jury was not required to view appellee’s loss as totally separate and apart from its general work. When the present delay resulted, a part of the general expenses of appellee’s business was incurred in the supervision of the employees and the maintenance of the machinery and equipment on the job here in question and also to the injunction suits which produced the delay.

“The propriety and business necessity of the itemized charges in the account were sharply disputed and

under the charge of the court, the jury were instructed to allocate to this job only a fair and reasonable amount of appellee's overhead, considering the supervision required and the proportionate amount of time and attention given.

"Overhead was one of the consequential expenses which the parties must have had in mind when the contract was entered into. This issue was submitted to the jury under a proper instruction. Appellant does not dispute the charge for material and supplies and labor."

Stewart v. U. S., 63 F. Supp. 653, is a recent construction delay case in point, in which substantial damages were allowed. The method of determining damages on the item of home office overhead was the same as that used by appellant in this case. It received the Court's approval. At l. c. 656:

"Its home office overhead for the seven months is not shown. Plaintiff, however, did show its home office overhead for the 12 months' period beginning April 1, 1935, and ending March 31, 1936, and it is fair to assume that for the last seven months of this period its overhead would be 7/12ths thereof. This amounts to \$20,196.79.

"This is the proportion of the total home office expense which the amount spent on this contract during the seven months period bears to the amount spent on all contracts during the same period."

The testimony on this item of damages may be found at pages 284, 310 of the Record, and in Ex. 65, Item 4. The method pursued by appellant in establishing the amount of damages under this heading is recognized by business firms and by accounting firms. (See the testimony of Accountant Benson at pages 392 to 396 of the Record.) It is recognized by the decisions of the courts, of which the *Grand Trunk* and *Stewart* cases, *supra*, are examples. The facts

are established so clearly by the testimony of Mr. Borst, and under the heading of Item 4, Ex. 65, that there cannot be any serious question about the amount allowable under this heading. An allocation, using "contract price" as the basis, is recognized as fair, but we did not confine ourselves to an allocation on this basis alone. An allocation, using "average number of employees" (which, of course, is the same as a "man hours basis") as the basis, is also recognized as fair, but we did not confine ourselves to an allocation on this basis. Instead, we combined these two bases and took the average percentage to arrive at the amount of overhead which should be allocated to or against the Sunflower Ordnance contract.

One of the factors in the formula used under Item 4 of Ex. 65 is the amount of overhead, \$75,316.58, the correctness of which cannot be successfully questioned. Mr. Borst testified that this was the correct amount. (R. 291). The Treasurer testified this was the correct amount. (R. 359). Attached to the deposition of Mr. Gaffney, Treasurer of appellant corporation, and designated as "Exhibit A," there is an audit by a firm of accountants, Black, Hanson & Company, showing the overhead to be this amount. (R. 361, 362) Appellant also offered to substantiate this amount by introducing a sworn copy of the appellant's income tax return for the calendar year 1944. (Ex. 67). When an objection was made to the exhibit, the record shows at 389 as follows:

"THE COURT: You have the testimony here. I don't see that the tax statement would help the Court any."

Another factor used in the formula is the "time element" of 39 days, or 1.3 months. The record establishes beyond any reasonable question that there was an actual

delay of 39 days, and that this delay was caused by appellee's failure to furnish the materials when needed for installation. The Accountant, Benson, at R. 393, 394, using the same facts as a hypothesis upon which to base his opinion, testified that it is considered sound accounting practice to use the average number of employees on the various jobs of a construction contract in allocating overhead to a particular contract. He testified that the amount of overhead would be \$6,452.52. (R. 396) The small difference between his computation of damages and the computation submitted by witness Borst is probably accounted for by the fact that the Accountant used the time basis as 39/365 days, while Mr. Borst used, in lieu of 39 days, 1.3 months. Appellant considers that the allowance of either amount is a matter of discretion with the Court. We feel, however, that the damages to appellant in overhead expenses, on the record, amounted to not less than the sum of -----\$6,649.82

Item 5. Loss in efficiency — increased cost of labor, \$14,611.72. In 25 C. J. S., Damages, Delay in Performance — Material and Labor Costs, at page 575:

"Where a party has been delayed by the other party in commencing performance, he is entitled to recover an additional amount which the delay has compelled him to pay for materials or for labor. He is also entitled to recover for his time and services during the period of delay, and the value of the services of his employees and equipment during the time of delay in the business in which they were then engaged, diminished by the compensation actually received by them for their services performed during the same period."

In *Clarke Const. Co. v. United States*, 290 F. 192, 1. c. 193:

"Damages claimed, under notice filed, with the general issue, were foreman's wages, interest on money retained by the government, loss of return insurance premiums by delayed cancellation, additional labor cost, additional office expense, interest, and depreciation in equipment. That losses of such a character do not represent profits, and are not speculative, as claimed, is apparent. Items, many of them identical in kind with those here claimed, were allowed in *Modern Steel Structural Co. v. English Const. Co.*, 129 Wis. 31, 108 N. W. 70. See 9 *Corpus Juris*, p. 791, par. 133, and note. It is urged, as against the additional labor cost, that it was not established, because the witness said he 'arrived at it by taking into consideration what the mill work actually cost him to install it, and what he estimated it would cost to install it.' That method is unobjectionable. *Guerini Stone Co. v. Carlin*, 240 U. S. 264, 280, 36 Sup. Ct. 300, 600 L. Ed. 636, and cases cited."

Also, please see *Feigh v. U. S.*, 8 Ct. Cl. 319, at l. c. 323, for a full discussion of this element of damages.

Appellant's testimony on this point may be found as follows:

Name of Witness	Pages of Record
Borst	309-330
Murphy	349-350
Col. Taylor	352-354
Wedlick	356-357
Nelson	376-382
Hobbs	387-389

This item of damages, in our opinion, constitutes the only real controversial element of damages in the claim, but nevertheless it represents a real and substantial loss suffered by the appellant in the performance of its contract. There can be no question but that this type of

damage is allowed in "delay cases." The *Clarke* case, *supra*, for example, in plain words states that the method used by appellant in this case is unobjectionable. It cites a Supreme Court case as authority for such a method. The method used, and approved in the cited authorities, is to ascertain what performance actually costs and estimate what it would have cost if there had been no delays, and the difference is the damage suffered and allowable as damages. A large chart, received in evidence as Ex. 66, graphically demonstrates this loss of efficiency.

Counsel for appellant respectfully requests the Court to frequently refer to this chart while considering the evidence on this element of damages. The testimony (R. 303, 330) follows this chart.

At the conclusion of the contract, on December 19,	
the labor payroll amounted to (R. 310).....	\$227,418.27
On November 10, the date on which the	
contract should have been completed, the	
payroll amounted to.....	181,467.26

The difference is (R. 310).....	\$ 45,951.01
---------------------------------	--------------

While this might at first glance appear to be the loss, we concede that it is not a fair method of approximating the loss because if the contract had been completed within the 120 days, that is by November 10, it would have been necessary to employ a larger number of employees than was actually employed, and the payroll would have been greater than \$181,467.26. Witness Borst analyzed, described and approximated appellant's loss. The claim is that because of the delays there was an increase in the cost of labor, that is to say, the cost of labor to perform the contract one hundred fifty-nine days was greater than the cost of labor would have been if performance could have been accomplished in 120 days. Or, another way of putting it is to say there was a loss of efficiency.

If all of the materials would have been available at the times called for in the construction schedule (please refer to the chart, Ex. 66) —

The first boiler could have been completed in	100	units of time.
The second boiler could have been completed in	90	units of time.
The third boiler could have been completed in	87½	units of time.

The total estimated time would have been.....277½ units of time.

Actually, however, on account of delays —

The first boiler required.....	105	units of time.
The second boiler required.....	105	units of time.
The third boiler required.....	105	units of time.

The total actual time required was 315 units of time.

Or, putting it another way, as shown on Ex. 65, it looks like this:

Operation	Units normally required	Units actually required	Loss of Efficiency
Boiler #1	100	105	5 %
Boiler #2	90	105	15 %
Boiler #3	87½	105	17½ %
Total loss of efficiency.....			37½ %
Average loss of efficiency per boiler (1/3)			12½ %

There is real merit in this element of damages. The claim that there was an increase in the costs of labor is based on solid ground. Two examples in our profession will make appellant's position clear to the Court.

Example 1. Suppose that an attorney presents a brief to a trial Court purporting to cover all questions involved in a case that has been tried. Let us suppose that after the Court spends a few days on the brief it finds that counsel has failed to brief a point which should have been covered, and that the Court then directs the attorney to furnish an additional brief; that the additional brief reaches the Court six weeks later. In the meantime the Court may have tried a dozen other cases. When the Court resumes consideration of the case, it would take time to again become familiar with the facts necessary to the writing of the opinion. If all of the law had been furnished in the first brief the Court would have been able to write its opinion in a shorter time and with much less work in the library.

Example 2. Or, let us take any complicated case that is submitted to a lawyer. If the client will furnish all of the facts to the attorney on the first interview, the attorney can write his brief and draw his petition at a minimum expenditure of time and work. But if the client fails to furnish the needed facts and the attorney must attempt to get his work done in three or four separate attempts, it takes much more time to handle the case than it otherwise would have taken. I am sure that the members of this Court are not so far removed from the practice of law as to fully appreciate the point that is made by this example.

Ericsson Co. v. U. S., 62 F. Supp. 312, is directly in point. There plaintiff recovered damages in a construction project caused by defendant's delay in furnishing approved shop drawings. Because of this delay plaintiff was unable to follow the sequence provided in the "production schedule." At l. c. 316:

"Most of the delay was caused by the failure of the architects to make tentative approvals or to submit to Washington the shop drawings approved by them, but a substantial delay occurred in the approval by the Housing Division at Washington. Had the full size drawings been furnished to plaintiff in time to submit and obtain approval of shop drawings in the ordinary course, the finished stone would have been delivered to the site of the work by the time the first floor slabs were poured and plaintiff was ready to proceed with the first-story walls. Instead, the delay in receiving the stone delayed laying the brick first-story walls. This, in turn, delayed the next operation in the sequence, and the delay continued accordingly into each of the classes in the planned sequence of the work.

"Because of the disruption of plaintiff's planned operations and delay in the early units of the planned sequence, completion of the entire job was delayed. At least 47 days of delay in completion of the entire job is attributable to the delay of the defendant in furnishing full size detail drawings for stone work and its failure to cooperate in plaintiff's efforts to secure approval of shop drawings in the absence of full size drawings."

So it is with the appellant in this case. If all of the materials had been on the job so as to enable appellant to follow its normal procedure, the work could have been done more efficiently and more economically. At great pains witness Borst obtained from the payrolls the actual cost of the "repeat" operations on the three boilers. These records show that the actual cost was \$131,505.47. (R. 311). In his explanation of Item 5, Ex. 65, Borst, after

relating the facts, expressed the opinion that this sum was $12\frac{1}{2}\%$ in excess of normal cost. (R. 327). In other words, it represented $112\frac{1}{2}\%$ of normal cost and that the normal cost, or 100%, would have amounted to only \$116,893.75. (R. 328). The difference between the actual cost and the normal cost is \$14,611.72 which represents a definite and certain loss suffered by appellant on account of the appellee's delay in furnishing materials.

Appellee attempts to refute appellant's theory of an increase in labor costs by showing (R. 674, 678) that in appellant's estimate of the costs it specifically quoted to the appellee that the cost of erecting the respective boilers would be:

Boiler #1	\$32,800.00
Boiler #2	32,800.00
Boiler #3	33,400.00

But the "cost to the appellee," or the charge against the appellee, and the "cost of performance by the appellant" are two different things. For example, if a lawyer were offered three cases like the present one, by three separate clients, the fee in each instance would probably be the same, although it would be much easier to try the second and third cases than it would to try the first case. The time and labor on the second and third cases would be considerably less, at least so far as the library work is concerned, but the fee would be the same and the profit (excess of contract price over cost of performance) would be greater.

CONCLUSION.

In conclusion, the five elements of damages are as follows:

Item 1: Extra cost of equipment rental.....	\$ 2,255.50
Item 2: Extra cost of Supervisory personnel (except Borst).....	8,267.53
Item 3: Extra cost of 90 days additional time and expenses — Borst.....	2,542.31
Item 4: Home Office Overhead.....	6,649.82
Item 5: Loss in Efficiency.....	14,611.72
Total damages.....	<hr/> \$34,326.88

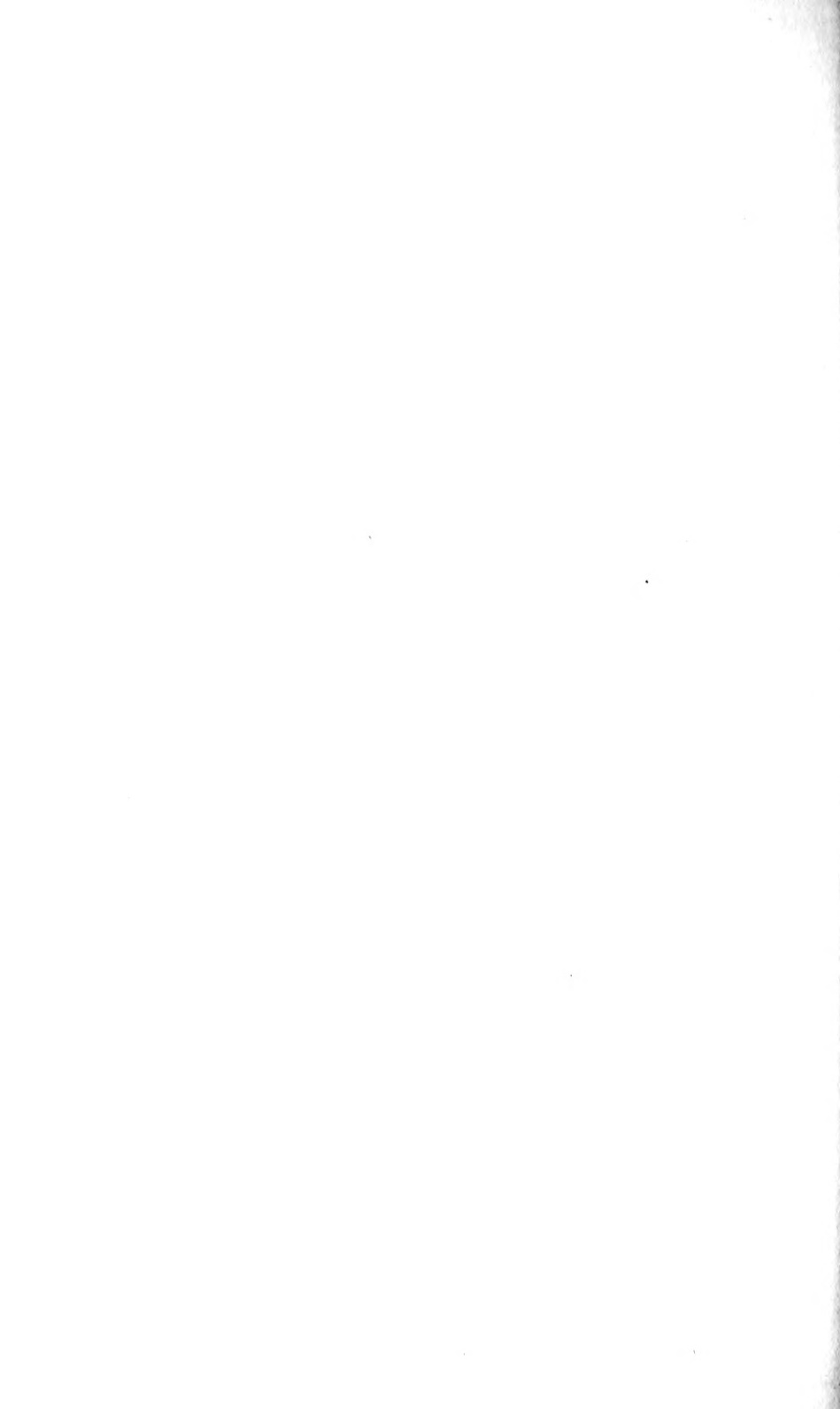
We submit that the Trial Court's determination of the damages is not supported by any substantial evidence, and that it failed to follow any recognized method of measuring appellant's damages. The decision below should be reversed and the cause remanded with instructions to enter judgment for damages in the amount established by the evidence. We believe that amount to be \$34,326.88.

Respectfully submitted,

LANCIE L. WATTS,

Attorney for Appellant.

Dated October 25, 1948.



No. 11,992

IN THE

United States Court of Appeals
For the Ninth Circuit

POWER SERVICE CORPORATION (a corporation),

Appellant,

vs.

W. E. JOSLIN, dba CORY-JOSLIN and
MACNSONS,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

RUDOLPH J. SCHOLZ,

Assistant United States Attorney,

422 Post Office Building, San Francisco 1, California,

Attorneys for Appellee.

FILED

1949

PAUL E. O'BRIEN,

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MACNSONS,

Appellee.

BRIEF FOR APPELLEE.

BRIEF OUTLINE OF CASE.

A contract between the United States Government was entered into in the Spring or Summer of 1942 with Wm. S. Lazier, Inc.-Broderick and Gordon, hereinafter called the Architect Engineer Manager, which for brevity is called "A-E-M", to construct an ordnance works near Eudora, being located in Johnson County, Kansas, and called the Sunflower Ordnance Works. The A-E-M was the general contractor and the entire project (of which Power House No. 1 was only a small part) covered approximately 12,000 acres.

There were numerous subcontractors handling different phases of the work; one of these was W. E.

Joslin, an individual, doing business as Cory-Joslin and Macnsons, and whose subcontract covered for the most part the plumbing, heating and ventilating of the entire project.

The plans called for three power houses which were numbered 1, 2 and 3.

During the course of the project, Power Houses Nos. 2 and 3 were constructed and in operation; Power House No. 1 had progressed to a point where the outside building had been erected and a part of the equipment for the power house actually installed, when Washington issued a Directive to cease all operations on Power House No. 1. (The progress of the war by this time had reached a point where Washington deemed Power House No. 1 unnecessary.) However, most of the material for Power House No. 1 had been ordered and most of it had been delivered to the site for assembling and installation.

The Hercules Powder Company was to be the operator of the project when completed and at all times during the course of construction supervised and helped with the overall construction of the Sunflower Ordnance Works.

Hercules had procured from various sources most of the materials, if not all, for the power house.

For a period of approximately 9 or 10 months, no further work was done on Power House No. 1.

Each of the power houses was contained in a separate building and Power House No. 1 was in a build-

ing possibly 200x200 ft. in extent, and when completed was to contain three boilers.

Suddenly the war in Europe took a turn for the worse and explosives on hand and those in the course of production were not meeting war requirements. Orders from Washington were issued to immediately complete Power House No. 1.

As the work of completing Power House No. 1 was more nearly in line with the knowledge and experience of W. E. Joslin, as compared with other subcontractors on the project, he was directed to enter into a sub-contract for the purpose of having the erection of the boilers in Power House No. 1 completed.

Specifications were prepared and bids were solicited. Power Service Corporation (hereinafter called PSC) was awarded the lump sum contract for \$448,000.

After PSC had eliminated the other bidders, that company raised objections to signing the formal contract which was presented to them on the 11th day of July, 1944, and it was not formally signed by it until on or about the 7th day of September, 1944. However, it continued to operate under the contract from the time of its award to completion.

During the interval, PSC wanted changes made in the contract to permit it extra compensation should the time of completion be delayed, on the ground that certain materials that the PSC claimed were supposed to be at the site were not there.

There was finally added to the contract the following clause:

“This contract is signed and executed by the Power Service Corporation without any *intent* on the part of the corporation to abandon or waive any right which it *may have* to submit, prove, and collect damages by reason of the *late delivery* of materials, *notwithstanding* the provisions of Par. 1-05, of the specifications.” (Italics ours.)

Before bids were received, each prospective bidder was *required and given* approximately three weeks’ time to look over all of the available materials. PSC only spent parts of two days in viewing this material.

After the contract had been made but before formally signed, PSC claimed it discovered that certain water wall tubes and water wall headers were not at the site and had to be requisitioned for through Joslin. It is a fact that these water wall tubes and headers were not on the site; however, PSC admitted that these were expeditiously delivered, and as soon as possible by Joslin after requisitions were issued by PSC for them. PSC claims that the delay in having these materials furnished delayed the completion of the contract for 39 days.

PSC contended at the trial that the Par. 5-04, sub-par. C, in the specifications which reads as follows: “*Nearly all of the materials required for the work has been stored in Power House No. 1 or in warehouses adjacent thereto*”, actually implied that the water wall tubes and headers *were on the site*; that PSC was led to believe that such materials were there (*not by Joslin, however*); that Joslin believed they were there, and that therefore a mutual mistake of fact

occurred which by reason of the clause added to the contract (Page, line) entitled PSC to collect damages either on the contract or that the contract should be reformed and on the reformed contract PSC was entitled to damages.

The trial Court found that there was no mutual mistake, or any mistake, that the contract should not be reformed but that under the "clause" added to the contract PSC was entitled to collect certain damages for the said tubes and headers not being on the site, in the sum of \$3,753.15.

As a matter of fact, W. E. Joslin had no knowledge of just what shortages in materials there were and was under no obligation or duty to have such knowledge, and the contract was purposely worded "Nearly all and etc." to cover any shortages that might develop. It was just common sense to believe that some shortages would develop under the situation.

In the very nature of the operations of a project as big as Sunflower, and in the desire to keep down unnecessary costs, it was natural that when the Directive to stop further work and cancel all outstanding orders not yet delivered or in transit on Power House No. 1 was received, and an indication that Power Houses No. 1 would not be needed, that some of the materials that had been delivered for that power house unquestionably were diverted to other and more urgent parts of the project or informally borrowed. Also, that some materials for Power House No. 1 were not delivered or received in view of the cancellation Directive.

For these reasons, not only was the contract worded with "Nearly all * * *", but also was worded to require the successful bidder to *immediately prepare an inventory* of all available and usable materials on the site, and as shortages developed *to requisition or place orders* for such shortages in sufficient time and detail *to enable Joslin* to procure the same.

THE PLEADINGS.

The complaint consists of three causes of action:

1. Breach of written contract.
2. Reformation.
3. If reformed, damages on the reformed contract.

The answer, besides setting up a denial, alleges that there is no consideration for the clause on the signature page of the contract, and that the appellant is barred by estoppel, Statute of Frauds, release and waiver. The trial Court found for appellant on the first cause of action and dismissed the second and third causes. It assessed damages against appellee in the sum of \$3,753.15. The appeal is based only on the first cause of action.

QUESTIONS ON APPEAL.

The principal questions raised in this Court are:

- (a) Is appellant entitled to damages;
- (b) If so, was the trial Court in error in not awarding appellant more or less damages?

If there is sufficient evidence in the record to sustain the trial Court on both questions, it is our opinion that the trial Court's decision will be upheld as it had the benefit of seeing and hearing the witnesses and thereby judging their creditability, knowledge and veracity.

It is stipulated that PSC claim is only based upon an *alleged shortage of water wall tubes and headers*. (Tr. 659-660.)

IS THE APPELLANT ENTITLED TO DAMAGES?

The chronological events are as follows:

June 17, 1944—PSC received specifications.

July 18-19—Part of these two days only were spent by PSC in physical inspection of the project on which to base its bid. (Tr. 416.)

July 8—Bid submitted by PSC.

July 11—Contract accepted and awarded to PSC.

July 13—Notice to proceed received by PSC.

Aug. 17, 1944—Date of first requisition by PSC for tubes, etc. (App. Exh. 20, Tr. 449, 662-667.)

Sept. 7, 1945—First time PSC claimed Joslin breached contract. This was in a letter not addressed to him or his firm. (Tr. 434.)

Dec. 1, 1945—First time PSC advised it was going to file a claim. (Tr. 540.)

Mar. 18, 1946—Acceptance of final payment, except claim for \$10,008.70, pending wth. ch. of Eng.

The offer (July 8) and acceptance (July 11), which is also the date of the contract, *constituted the contract*. (84 Pac. 1000, 123 Pac. 191.)

Under the specifications (1-05) PSC acknowledged “* * * full satisfaction of any delays encountered and the constructor (Joslin) will not be liable for any costs or expenses incurred by the sub-constructor (PSC) as a result of the increased time for completion of the sub-contract.”

In turn, appellant was not charged any penalty for delay on its part as is the custom in sub-contracts. Therefore, appellant has no case up to this point.

Appellant, however, ejects other elements into the case, which complicate the matter.

First: It claims that a clause on the signature page of the contract of July 11, 1944, but appended in September, nullifies 1-05 insofar as releasing Joslin from any damages PSC incurred by any delay; that it contends *this clause* permitted it to sue Joslin for any damages it sustained because *Joslin* did not have the tubes and headers *on the premises when the contract was entered* into.

We do not agree that it does. The clause states:

“The contract is signed without “*any intent on the part of PSC to waive any right it may have to collect damages by reason of the late delivery of material notwithstanding the provisions of Par. 1-05 of the specifications.*” (Italics ours.)

(a) Does not that simply mean, particularly when taken in conjunction with the entire contract; that if

Joslin, after PSC makes requisitions for material, makes *late delivery*, that PSC does not *intend* to waive any right to collect damages?

(b) That PSC, in signing the contract, gives notice that if it has any damages it is not *its* intent to *waive* it? It *does not* state that *Joslin agrees to waive* Par. 1-05, nor any of his rights. It is simply a clause of INTENT.

(c) It limits its claim to damages to *late delivery* of materials by Joslin. PSC *admitted* time and again that *Joslin promptly delivered all the material* he was to deliver. There was no late delivery.

It was only added after rejecting other proposed claims which would have changed Joslin's rights, and when the Government's attorney assured Joslin it "added nothing to the contract." (Tr. 578-579-549.)

(d) Appellant's Ex. 16 and Appellee's Ex. M and N (Tr. 570 et seq.) show that Joslin would not consent (nor could he bind the Government to any clause, which changed the contract (668).)

Wedlick's and Joslin's testimony shows they had no intention or authority to alter the terms of the contract. (Tr., supra, and 723.)

Second: Let's take the contract: It states:

"Subcontractor (PSC) has *read* and is familiar each and every part of said subcontract. (Page 1 of Contract.)

"*In consideration* of the subcontractor undertaking herein, the subcontractor shall receive *payment* for work performed in the *lump sum amount*

set forth in Article I hereof which *shall constitute full compensation for the performance* by the sub-constructor of the work and services authorized herein.”

Assuming the clause validity waives the restriction of Par. 1-05, (which is the only paragraph it refers to), and assuming further that Par 1-05 refers to not “late delivery” but to material on the site, is Joslin liable? The contract calls only for delivery of material by Joslin.

Specifications, Par. 5-04, state:

“All material * * * will be furnished by constructor (Joslin) * * * material * * * will be delivered to subconstructor (PSC) at points and in manner specified. b. Immediately after starting work * * * subconstructor shall prepare a ‘list of materials’ * * * in order that shortages may be immediately determined. Such shortages will then be reported to constructor, etc.”

If a waiver of damages, does waiver of a paragraph of the specifications waive also the *balance* of the *contract*, particularly in view of *Art. V* of the Contract?, to-wit:

“It is further understood and agreed that all other terms and conditions of said subcontract shall be and remain the same.”

PSC accepted the contract as written but it was in September, 1944, before this clause was signed. The contract was in full force and effect in the meantime and PSC had worked continuously under it and the specifications until most of the contract was completed.

We are familiar with the rule that a clause added to the contract may be under certain circumstances more controlling, but we do not believe it applies here for the following reasons:

(a) For the reasons set forth above.

(b) It applies only to a paragraph of the specifications—not the entire contract. It violates the clause that PSC agrees that all other terms and conditions of the contract remain the same.

(c) The clause is construed against the person drafting it.

(d) It would require the Court to make a new contract for PSC,—to read into it what PSC contends.

(e) The conduct, and consistent refusal of any changes that PSC sought to interpose for any additional compensation. (Tr. 579-420.)

(f) Joslin could not legally change the Government's basic contract, which PSC knew. (723-571-592-668.)

(g) There was no consideration for it. It accepted the lump sum as full compensation. (See following paragraph.)

Third: There was no consideration for the "clause".

(a) Par. 1-04 (not 1-05) states:

"The lump sum offered will be the basis of compensation of the offer."

(See Tr. 565 for explanation of lump sum contract.)

If the lump sum is the basis for the compensation what other consideration was there? PSC accepted the sum as *full compensation* (not price) and damages are part of compensation. What about the other contractors who bid on the contract and who were eliminated by PSC *accepting* this lump sum as compensation? What compensation could move *from PSC to Joslin* for the additional clause? What is Joslin's position after the contract was made?

(b) The contract was made by the offer and acceptance (July 11, 1944). Borst of PSC testified "He immediately proceeded to work under the contract". There was no other consideration.

(c) *Our questions* as to what consideration PSC claimed for the clause were answered vaguely. However, Borst did state that, in effect, the only consideration was a "going forward with the execution", but he admitted he never mentioned that to Joslin. (519.) It was only in his *mind*. The Court has a right to consider this only as an *afterthought*.

We cross-examined Borst fully on the subject of consideration. (Tr. 421-519-520.) There was no direct examination on this. We asked him if there was anything to indicate, either in writing or orally, anything that implied a consideration or a benefit, and the only answer was the above. Joslin denied any consideration. (Tr. 701.)

Consideration, in its broadest terminology, is a *benefit conferred* or *agreed to be conferred*.

Where is the benefit conferred or agreed to be conferred? There was no agreement. Joslin received no benefit. He would not suffer if USC had put the "thought" into action and stopped the work.

(d) If the clause enlarges PSC's rights, it in turn gave nothing to appellee—it promised nothing—appellee received nothing. PSC suffered no prejudice nor did it agree to suffer any prejudice as an inducement to appellee to sign it. It is void for want of consideration. See *Burner v. American Bar Q. Min. Co.*, 76 Cal. App. 774. *Cuneo v. Claybourn*, 90 F. (2d) 235 cited by PSC.

(e) The bids were made on the specifications. Nothing was added that PSC was not paid for or agreed to do.

(f) Joslin did everything he was supposed to do under his contract.

(g) PSC had already been awarded the contract and performed most of the contract.

Fourth: The first time that PSC claims Joslin breached the contract was September 7, 1945, (the contract was made July 11, 1944), and that in a letter not addressed to him. Yet the specifications clearly state (1-05 (b)):

*"Immediately after starting work under the sub-contract, the subconstructor (PSC) shall prepare a list of materials, * * * in order that shortages may be immediately determined. Such shortages will be immediately reported to the constructor (Joslin) for use in obtaining the balance of ma-*

terial required for the completed work * * * the *subconstructor* will be *responsible* for *advising the constructor* of his *requirements* * * *'. (Italics ours.)

Certainly PSC did not do this, although requested several times. (Tr. 451-457.) It knew it had to do so (Tr. 523), and relied entirely on the specifications. (Tr. 407.) It was requested several times to get in the inventory. (455-8.)

Fifth: Is not PSC estopped from claiming an alleged breach of contract?

(a) By the above clause.

(b) PSC requested extension of time to December 5, 1944. (Tr. 589-681.) It then refused it perhaps because it could not be penalized for delay.

(c) It continued on with the contract after it stated it knew that there was a shortage of walls and headers and after Joslin notified PSC that he would not and could not alter the contract.

(d) It never claimed any breach of contract or damages from Joslin until after its claim was rejected by the Government.

(e) It failed to do what it was required to do by its contract, to-wit make an *immediate* inventory for the purpose of *ascertaining the shortages*.

(f) It was stipulated the only "late delivery" (see clause) alleged by appellant was a shortage of tubes and headers but the first requisition put in by PSC

was on August 17, 1944, and was for either *furnace* tubes, or *boiler* tubes. (Tr. 663.) It said its first delay was Aug. 17 or 29. (Tr. 451.)

(g) PSC could easily have protected itself before putting in its bid and before "freezing out" the other contractors. It could have requested a change in the contract or the addition of a clause, but it took the contract "as is".

Sixth: Assuming that: (a) Appellant is not barred by the contract, or any of its clauses, for claiming damages; (b) that there was a consideration for the clause; *then what was the breach by Joslin claimed by PSC?*

It is agreed that Joslin was not in fault in procuring any material; also that he did not make any "late deliveries" but that they were furnished promptly. (518.)

It is *not* that water walls and headers were not *delivered* as *contracted* for by Joslin, but *that they were not on the premises*. That neither PSC nor Joslin knew what was on the premises at the time the contract was entered into. (581-7.)

Where can such an agreement be found in the contract?

PSC says it in Par. 5-04 (c), to-wit:

"*Nearly all of the materials required for the work has been stored in Power House No. 1 or in warehouses adjacent thereto*".

We contend that “nearly all” means what it says. The evidence shows that nearly all of the material was there. That less than 11½% of the material was not stored there. This 11½% is figured in dollars as is the custom and to which PSC agrees. (Tr. 408-410.)

Yet appellant claims it “understood” by the term “nearly all” *to mean that all essential and necessary material for immediate construction was on the site.* It had to so understand it, to claim a cause of action.

Would not this require the Court to misinterpret a common, ordinary phrase, or change its terms? Would it not require a change of a meaning from that which is clear, unambiguous and certain and so understood by all the other bidders and we believe appellant, because realizing that it is clear, it asked the Court in its second cause of action to reform specifically that clause so as to state:

“Not all essential and necessary materials required for the construction of the boilers were then in storage at the project. * * *.”

Seventh: If Paragraph 1-05 is eliminated, as contended by PSC—then there is no completion date and PSC has not been delayed under the contract, (Tr. 592, et seq.) PSC can not exclude part and accept part.

Eighth: Contracting officer's findings. The cases cited may be distinguished by the Court believing it was an arbitrary finding and a different contract than the one before the Court. However, be it as may, PSC would be also bound by the findings, among others, (a) its claim for only \$10,008.70, (b) its denial, (c) the

duty of PSC to make a list of material (257), (d) that list showed missing *tubes after* it was started (258), (e) that because of the missing material the contract was worded "nearly-all" (259) what tubes were there (260) and enough for one boiler (262) delivery of tubes may not be the sole reason for delay (264). We do not recall it being admitted in evidence but is, we think, Exh. 45 for identification. There is a great deal of other findings, among them that Joslin furnished all material as fast as possible. If Joslin is bound, then so is PSC.

Ninth: No breach by Joslin.

PSC case is based on the fact that part of the tubes and headers were not on the premises at the time the contract was signed. The evidence shows that Joslin never stated what was on the premises. That Borst admitted requisitions were filled by Joslin within a "matter of hours or in 2 or 3 days". There was no fraud—no mistake (except, perhaps, on the part of PSC which thought that "nearly-all" meant tubes and headers). In view of the fact that PSC was to make an inventory to ascertain the shortages, it was an assumption that is contradicted by the contract. If some person, other than Joslin or an authorized agent of his, thought the materials were there and were not, it is not binding on him. If above is true, the non-suit should have been granted.

IF APPELLANT IS ENTITLED TO DAMAGES—DID TRIAL COURT
ERR IN NOT AWARDING APPELLANT MORE OR LESS DAM-
AGES?

1. If appellant was entitled to damages, we contend it should be awarded \$1.00. PSC contends it should be \$34,326.88.

PSC first objects to trial Court's findings and conclusions that its damages are limited to \$10,008.70. The trial Court, regardless, found it only damaged in the sum of \$3,753.15.

Briefly, the facts are that when PSC was given its final payment on this contract, it gave Joslin a letter dated March 18, 1946, as follows:

“Final payment on subcontract * * *.” (The one before the Court.)

“Payment in full, exclusive of outstanding claim of PSC which has been submitted to the Chief of Engineers for decision.” (Tr. 574, et seq.)

It is *admitted* that the claim submitted to the Chief of Engineers was for \$10,008.70. That there was *no other claim*. (Tr. 430-431.) We feel no other comment is necessary. We go even further, and say it appears that if the Chief of Engineers denied the claim, which it did, that this constituted final payment for everything. It was the intent of this letter as appears therein.

U.S. v. Clyde, 80 U.S. 35.

PSC finds no answer to this in its brief (P. 14-17) other than its statement that (besides appellee's denials) he pleaded a bare estoppel-release—and waiver.

Under the liberal rules of pleading, we believe the pleadings are sufficient if no objections were made. No objections were made in the trial Court and the case was tried under the pleadings. PSC had ample ways and means in the trial Court if it had any objection to the pleadings, to strike, make more definite, or to find out what the defenses were, if not satisfied.

2. Was appellant entitled to more or less damages?

(a) There is admittedly a conflict in the testimony; however, if sufficient evidence is found in the record to support the trial Court's findings we believe the law is that the trial Court will be sustained.

(b) Appellee took the testimony of appellant and by his analysis thereof showed that any delay in completion was due to appellant's own fault. Because of the nature of the testimony it would be unfair to pick out certain portions of the testimony, but it is submitted that the testimony from 595 to 672-674 to 712 and the cross-examination following shows that, taking PSC's own progress or construction schedule (Exh. 62) (which shows the work it intended to do at certain times), it could have completed its work without any delay. (Exh. P-Q-R-S-T-U-V-W-X - Exh. 62.) It is our opinion that the trial Court gave considerable attention to the testimony of appellant and appellee relative to these charts.

Exh. R-S-T-U-V may be considered only in its relation to delay as to tubes and headers, the only matter before the Court.

PSC contends that it is a fact that the tubes were required on August 1, 1944 (P. 23), yet PSC admits it did not get the list of tubes until August 22 (Tr. 447) and that its requisition was made August 19 for furnace tubes (449); that its first delay was August 29 or 17 (451) and under date of August 31 wrote Joslin that the tubes were checked and requisition issued. (461.)

PSC contends (P. 24-25) that Court erred "because the appellant didn't do what it should have done". In other words, even if PSC could have finished the work in 7 days, the Court was in error because PSC delayed completion for 38 or more days.

PSC contention (P. 25) that Court erred on Boiler #3, fails to take in the complete testimony including its own failures.

Appellee in the testimony cited did not concede the delay but merely *that PSC own construction schedule showed* it should have completed October 14 and did complete it on October 2. The difficulty in pointing out only a particular part of the transcript, is illustrated by PSC quoting only part of the answer in support of its contention. Joslin testified PSC was on schedule on October 27 (632).

PSC states all parties agree that delivery on Boiler #3 was 41 days late (last line P. 27). This is vigorously denied. We contend there was no late delivery; that all material was promptly delivered when Joslin was notified. Appellee admits the delivery of certain material on certain dates. PSC states its testimony

shows "the non-delivery of materials were unreasonable". All material was delivered and the testimony of even PSC shows it was not delivered at unreasonable times.

The material not there had to be formally requisitioned. Mr. Borst stated (Tr. 411) "It was not available without a formal requisition".

Items of Damages.

The attorney for appellee confesses he is not an expert on the figures as to these damages and will try to limit it only to those figures he thinks he knows.

It appears to us that appellant is limited by its claim filed with the Chief of Engineers for \$10,008.70 as it acknowledged *full payment of all other claims.*

This claim was divided into two parts:

- (a) *increased cost of renting equipment,*
- (b) *increased cost of supervisory personnel.*

As to (a): PSC claims \$2,255.50. The evidence offered was vague — hearsay — secondary — and no proper foundation. Our objections were, we believe, sustained. (Tr. 267-275.) If not, the Court gave little, if any, weight to it. It appears, further, it was rented from its alter ego, Fegels Construction Co. (405-483-511.) It further appears that the rental was not necessary after November 10, 1944.

As to (b): PSC claims \$8,267.53 for this item. The number of employees, we perceive, were 9. (Tr. 437, et seq.) It appears PSC and Fegels Construction Co. were alter egos as far as this matter is concerned

(supra). Objections were made that Borst was not qualified, which were sustained. (Tr. 286-297.) We believe the evidence on this was so vague—not properly identified or foundation laid—and not within the contemplation of the parties, that it should either be rejected or given little weight. The trial Court from its remarks apparently agreed, stating: “ * * * it seems impossible to the Court” (296). “It is hard for the Court to believe that the witness can testify to matters that he is being interrogated about.” (297). Mr. Borst was, we believe, an engineer supposedly on the job at Sunflower and it would seem difficult for him to testify as to the two corporations, and the numerous details thereof. As a matter of fact, he had to be assisted by his attorney. We believe little, if any, weight should be given to this item. The foundation of the treasurer of PSC’s testimony was also viewed doubtfully, to-wit, “* * * I will say I hardly believe that statement” (360); also “That is quite a remarkable bit of evidence. As the saying is, he certainly was some man to testify all that independent of any records.” (360).

Generally:

(a) The Court may agree that PSC did not have sufficient equipment for the work; that if 95-73/100% was completed October 27, the balance should have been completed November 12, 1944; that PSC was not diligent in ascertaining the shortages; that even if delayed, PSC could have advanced other work; that it is accepted practice in such a contract (with no

penalty for completion) that some delays will occur, and is an inherent hazard;

(b) As to the expense of Borst that he had other contracts and stated he had to be on the job until December 15, 1944 to sign *change orders*;

(c) That Joslin's testimony shows no loss of efficiency, and that knowing a shortage, PSC should have had a plan in case of delay.

**APPELLANT'S BRIEF: PAGE 15 (3) AMOUNT OF DELAY
ON BOILERS 1, 2, 3.**

The findings of the Court are more favorable to appellant that the evidence warrants.

The appellant claims that it required the "Water Wall Tubes" on August 1st and its first notice in this regard was dated July 26, but it did not contain definite information as to just what "Water Wall Tubes" were short.

The contract required "requisitions" for material sufficiently in advance to enable appellee to procure it. (R. 83.) The requisitions should sufficiently identify the material so that it could be procured. However, appellant's first requisition for "Water Wall Tubes" was issued on August 19, which was the first specific information given as to what particular "Water Wall Tubes" were needed. (R. 447-449.) Appellant admits appellee made every effort to procure material as soon as requisitions were made (R. 519 and 659.) Appellant depended on others to determine what it actually needed. (R. 734.)

The Exhibits Nos. 50 to 64 (Progress Schedules) show that the "Tubes, Water Wall Headers and Water Wall Tubes" were 99.9% complete on Boiler No. 1; 99.8% complete on Boiler No. 2 and 99.7% complete on Boiler No. 3 on October 22, and said schedules show that no further work was done on this phase of the contract between October 22 and November 12. (R. 650-652.) Had appellant maintained its own proposed percentage of completion per day as set out in its progress schedules, it would have completed its contract by November 10, 1944 (R. 595-636, Ex. 62; R. 658-659), with the exception of the "Dry-out and Boil out" process, which phase was eliminated from the completion of each boiler.

The Court's findings as to the extent of delay on the boilers is based upon the testimony of W. E. Joslin, appellee. (R. 599-601.)

However, appellant is trying to charge appellee for its own delay. The absence of materials did not cause a lay off of help or suspension of work. (R. 1, 506.) After September 20, 1944 (date last Water Wall Tubes were delivered) no additional boiler makers were employed to catch up with the construction schedules (R. 1, 673; 473); there was very little labor "turn over" and only one Sunday (September 3) when a sizable crew worked (R. 1, 471-476; 491) and at no time did appellant employ a double shift although its contract called for it, if necessary. (R. 1, 498-499; 658-659.)

Between October 15 and 29 it reduced its force by over 63% (see payroll record). When appellant sub-

mitted its proposed progress schedule, it was behind in the amount of the over all work it proposed to do and continued behind its own proposed schedule to the end of the job. (R. 499.)

It took over eight weeks to complete the inventory which was one of the first things appellant was supposed to do (R. 445-447) and this delay caused repeated requests to get the inventory completed. (R. 449; 451-459; 462.)

Additions to the contract entitled appellant to additional time of five days to complete which automatically extended the time to November 15 instead of November 10 (R. 502-505; 658) but appellant refused the extra time to aid in its claim for damages.

The record is replete with evidence that from the day (July 13, 1944) when appellant was awarded the contract and thereby eliminated competition, it began a studied effort to obtain extra money under its contract (R. 663) which continued throughout. (R. 1, 713, Ex. 7; R. 588, Ex. 9; Ex. 16; Ex. 18; R. 505.) Had appellant spent half as much energy in completing its contract, it could have finished well within the allotted time.

"S" CURVE.

Appellant devotes considerable effort in its brief (pp. 28-29) to show that the "S" curve on Exhibits Nos. 50 to 64 support its contention that it was prevented from completing its contract within its own proposed estimate of time. The "S" curve (R. 747;

771) is just an estimate and as drawn on the Exhibits 50 to 64 is not a true reflection of the evidence submitted because after it was set up on the proposed progress schedules, Item No. 8 of Segment III, Boiler No. 1 entitled "Dryout and Boil Out" process (being also the same process as is covered by Item No. 10 on Boiler No. 2 and also Item No. 11 on Boiler No. 3) was deleted on all three boilers from the contract, but the "S" curve was never corrected to reflect these omissions. This Item No. 8 represents \$3,600.00 or 6% of the Segment III, Boiler No. 1 which is set up at \$59,850.00 in appellant's breakdown (Exs. Nos. 50 to 64) and which appellate had allocated 27 days in its "S" curve to complete. The "S" curve also reflects 20 days for the same operation on Boiler No. 2 and 21 days for the same operation on Boiler No. 3; while these are simultaneous operations they make it appear that appellant had more work to perform at the end of its contract than really existed. These three items constitute 2.4% of appellant's entire contract which were deleted and still appellant contended it was entitled to some 14 days to complete its last 5% while obviously the last days were to catch up for delays which occur in any contract of this magnitude.

APPELLANT'S POSITION INCONSISTENT.

There is no dispute that the only place in the entire contract which fixes the completion date is Par. 1-05 (R. 87) and without which there would be no time limit of 120 days and consequently no possible basis

for damages; however, appellant is in the unique position of contending in one breath that it disregards the provisions of paragraph 1-05 of the contract (R. 102; Ex. 2) which denies "damages" and in the next breath depends on other provisions of the same paragraph 1-05 which designates the 120 days for completion.

In other words, the clause it added to the contract (R. 89(c)) broadly takes exception to the whole of Par. 1-05, but to sustain its position, appellant uses some and rejects other provisions of this Par. 1-05. Appellee did not consider that the added clause changed the contract. (R. 592-593.)

Dated, San Francisco, California,
December 22, 1948.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

RUDOLPH J. SCHOLZ,

Assistant United States Attorney,

Attorneys for Appellee.



No. 11992.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

POWER SERVICE CORPORATION, A CORPORATION,
APPELLANT,

VS.

W. E. JOSLIN, DOING BUSINESS AS CORY-JOSLIN
AND MACNSONS, APPELLEE.

APPELLANT'S PETITION FOR REHEARING.

LANCIE L. WATTS,
801 Scarritt Building,
Kansas City 6, Missouri,
Attorney for Appellant.

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W. E. JOSLIN, DOING BUSINESS AS CORY-JOSLIN
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APPELLANT'S PETITION FOR REHEARING.

Comes now appellant in the above-entitled cause and moves the court to grant it a rehearing upon the following grounds:

1. This court, as grounds for denying the relief prayed by appellant, found as a fact that appellant and appellee had entered into a valid contract before the written contract was signed by the parties and approved in writing by the architect-engineer-manager and the contracting officer, which finding was based on an inference that appellant, by proceeding with the work before the formal contract was executed, expressed the intention to contract and did contract with appellee, whether or not a written contract was formally executed.

2. This finding by this court is diametrically opposed to the finding of fact made by the trial court.

3. The trial court's finding of fact is not clearly erroneous within the meaning of Section 52a of the Federal Rules of Civil Procedure.

4. No appeal was perfected from the finding of fact of the trial court.

5. This court erroneously held that the provision that the subcontract should be subject to the written approval of the architect-engineer-manager and the contracting officer, and should not be binding until so approved, was solely for the protection of the government; whereas appellant had the right to require that such approval be evidenced in writing.

THE FACTS.

In this case appellant obtained judgment in the trial court for damages due to delay in prosecuting a construction project caused by appellee's failure to furnish materials. Appellant appealed only from that part of the final judgment awarding damages in the amount of \$3,753.15 instead of \$34,326.88 (R. 109), but appellee perfected no appeal. The trial court found that there was no binding contract until the formal written contract was signed and approved in writing. This court held that there was a completed contract before the signed contract was executed, under the terms of which appellant was entitled to no damages whatsoever.

Appellant could not foresee that this court's decision would be based upon a question not raised by the appeal and consequently this is the first opportunity that appellant has had to be heard upon the question decided by the court.

Appellee invited bids for the erection of boilers in a powerhouse at Sunflower Ordnance Works in Kansas by means of a letter with a copy of specifications attached. These specifications, for the main part, described the proposed work and indicated how it should be done, but included the following provisions:

"1.05.a. The subcontractor will be required to commence work under the subcontract within five (5) calendar days after the day of receipt by him of notice to proceed and will be required to prosecute said work faithfully and energetically and to complete the work within one hundred twenty (120) calendar days, the time to be computed from said date of receipt of notice to proceed, except as provided thereafter in this paragraph."

The specifications then provided for extension of time for completion if the contractor ordered the subcontractor to suspend work on account of unfavorable conditions, and in case the subcontractor failed to perform the work at a satisfactory rate by reason of delays in the delivery of materials and supplies because of war priorities or because of conditions existing through no fault or negligence of the subcontractor, and then provided as follows:

"e. In case time for completion of the work is increased due to any of the causes specified herein it is distinctly understood and agreed that the subcontractor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered, and the constructor will not be liable for any costs or expenses incurred by the subcontractor as a result of the increased time for completion of the subcontract.

"f. Inasmuch as the provisions of the subcontract documents relating to the time for and the rate of performance of the work and the time for completion of the same are inserted for the purpose of enabling the

United States Government to proceed with the construction of the Sunflower Ordnance Works with its predetermined program of war effort, such provisions are of the essence of the subcontract.

"1-29. The subcontract shall be subject to the written approval of the architect-engineer-manager and the contracting officer, and shall not be binding until so approved."

Pursuant to this invitation to bid, appellant filed a written bid which recited that,

"The undersigned agrees, upon receipt of written notice of the acceptance of this offer within sixty days after the date of opening the offers, to execute the form of contract in accordance with the offer as accepted, and give payment and performance bond, with good and sufficient surety or sureties, for the faithful performance of the contract, and for the protection of all persons supplying labor and materials in the prosecution of the work, within two days after the prescribed forms are presented for signature.

"Performance will begin within five calendar days after the receipt of notice to proceed and will be completed as specified in paragraph 1-05 of the specifications."

Written notice to proceed was mailed to appellant and received on July 13, and a written unexecuted contract was mailed to appellant for its signature on July 14. The appellant started the contemplated work by taking an inventory of the materials on hand, but refused to sign the contract as prepared because it provided for completion in 120 days without including any provision to compensate appellant for damages if delay in performance should be caused from shortage of materials which were to be supplied by appellee. After repeated conferences by mail and otherwise, a clause was added to the written contract as follows:

"This contract is signed and executed by the Power Service Corporation without any intent on the part of the corporation to abandon or convey any rights which it may have to submit, prove and collect damages by reason of the late delivery of materials notwithstanding the provisions of Par. 1-05 of the specifications."

ARGUMENT.

1. From the above facts it appears that appellee, when it asked for bids, expressly provided that the contract should be subject to the written approval of the architect-engineer-manager and the contracting officer, and should not be binding until so approved. With full knowledge of that reservation appellant made a written bid in which it offered, upon receipt of notice of the acceptance of the offer, to execute the form of contract in accordance with the offer as accepted and give payment and performance bond. Therefore, when the bid was accepted each party had served notice on the other that it was not contemplated that mere acceptance of the bid would amount to a contract between the parties. One offered to contract provided written approval of the advertised terms should be obtained, and the other offered to enter into such a contract by executing a formal contract and giving a performance bond. If nothing more had occurred no judge or jury would be permitted to find that the parties had entered into a binding contract.

The only evidence tending to show that each party had waived a written signed contract and approval in writing is that appellee notified appellant to proceed with the work and appellant, before the formal contract was executed and approved in writing, proceeded to take an inventory which was the first step required for performance of the contemplated contract.

Conceding, for the sake of argument, that such conduct will support an inference that the parties actually entered into a contract before any formal written contract was signed and before any written approval thereof was obtained, nevertheless, merely proceeding with the work does not, as a matter of law, constitute the making of a contract, except the contract which the law implies and which will only support an action on *quantum meruit*. Such an implied contract does not contain the provisions of Section 1-05.e. of the specifications which this court held was a bar to appellant's right for damages for delays in furnishing materials.

The fact that appellant was directed to and did proceed with the work is only circumstantial evidence susceptible of more than one legitimate inference. The tremendous number of cases in *quantum meruit* and *quantum valebant* conclusively prove that it is very common practice for one person to proceed to furnish labor, material or merchandise to another before the parties have made a contract fixing their respective rights and liabilities. This is especially true when there is need for prompt action but the determination of the amount of compensation for damages and like matters requires deliberation.

In every case where the parties contemplate that the contract shall be reduced to writing before it is binding, but begin performance thereof before the contract is written and signed, the question as to whether or not their conduct shows that they actually entered into a contract before the written contract was signed is a question for the jury or the court sitting as a jury.

Hocking v. Hamilton, (C. C. A. 3) 122 Fed. 417.

Patrick v. Smith, (Tex.) 38 S. W. 17.

Morris Run Coal Co. v. Carthage Sulphite, Pulp & Paper Co., 206 N. Y. S. 676.

New England Box Co. v. Tibbetts, (Vt.) 110 Atl. 434.

Saltzman v. Barson, (N. Y.) 146 N. E. 618.

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Wharton v. Stoutenburgh, 35 N. J. Eq. 266.

Hopkins v. Paradise Heights Fruitgrowers Ass'n, (Mont.) 193 Pac. 389.

Heilman v. Lazarus, 90 N. Y. 672.

Park v. Kansas City So. R. Co., 58 Pa. Super. Ct. 419.

Evidence that the parties contemplated the execution of a formal written contract is some evidence that their prior oral or other informal agreement by correspondence was merely tentative.

Universal Products Co. v. Emerson, *supra*.

Wharton v. Stoutenburgh, *supra*.

In addition to the evidence that the parties contemplated the execution of a formal written contract and the approval thereof in writing by the architect-engineer-manager and the contracting officer, there is evidence that the parties, by their own conduct, construed their tentative agreements and conduct to mean that there was no binding contract until the formal contract was signed and the approval thereof was procured in writing. When a

formal contract was sent to appellant to be signed it was not first signed by the appellee. This indicated that there would still be no contract, even though the document was signed by appellant, until it was returned for signature of appellee and approved in writing by the contracting officer. When appellant refused to sign the contract because shortage of materials threatened a delay which would result in damage, both appellee and the government officer were informed thereof. Neither one insisted that there was already a perfect contract, but they entered into negotiations for an additional provision for appellant's protection. They agreed upon this additional provision and then the formal contract was signed and the written approval was endorsed thereon. When appellant presented a claim for his damages it was refused, not on the ground that it was barred by the provisions of a contract made before the formal instrument was executed, but on the ground that appellee did not know the amount thereof.

All of this is strong evidence that both parties to the contract and the government officer all understood that no contract had been made before the formal written contract was signed and approved in writing. Furthermore, the circumstantial evidence tending to prove that a contract already had been made (appellee's direction to proceed with the work and appellant's compliance therewith) is greatly weakened by the fact that the parties knew that the purpose of the contract was to enable the government to proceed with dispatch in the war effort. Any patriotic citizen would be loath to refuse to begin to take an inventory, the purpose of which was to speed the war effort, merely because the details of a contract had not yet been worked out.

2. The trial court found that the only contract between appellee and appellant was the formal written con-

tract signed by the parties upon which was endorsed the written approval of the architect-engineer-manager and the contracting officer. The trial court made the following finding of fact:

“Certainly there could be no binding contract until it was signed and approved. If the bid and acceptance was the complete contract there would have been no necessity for the bond, the written contract and the formalities leading up to its execution. The bid itself provided that it would not be binding until the contract and bond was executed and approved” (R. 102).

3. The trial court’s finding that the parties did not enter into a contract until the written contract was signed and approved in writing is not clearly erroneous within the meaning of Section 52a of the Federal Rules of Civil Procedure. That rule provides that,

“In all actions tried upon the facts without a jury, the court shall find the facts specifically and set out separately in conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

The rule was intended to give a very restricted power to the appellate court to reverse a trial judge’s finding of fact only in cases where reasonable minds might not differ. It is not the intent of the rule to grant authority to an appellate court to reverse a trial judge simply because the appellate judges draw one legitimate inference from a state of facts and the trial judge drew another legitimate inference therefrom. This is not a case where a trial judge’s finding of fact is supported by the testimony of a witness who tells an incredible story or who has been impeached and whose story is contradicted by a large volume of testimony. It is a case where the parties contem-

plated and expressly stated there should be no contract except a formal written contract signed and approved in writing. They nevertheless proceeded with the initial work to be done before they had executed the contemplated written contract because the work was intended to speed the war effort. But both parties pursued a course of conduct plainly indicating that they did not consider that a contract had been made.

In view of the tremendous number of cases in which a party has been compelled to sue on *quantum meruit* or *quantum valebant* because performance of a contemplated contract was undertaken before there was any meeting of the minds fixing the rights and liabilities of the parties, it cannot be said that the finding of the trial court was capricious, arbitrary, unreasonable or clearly erroneous.

4. Even if appellee had perfected an appeal and specifically assigned as error the action of the trial court in finding that the formal written contract bearing the written approval of the architect-engineer-manager and the contracting officer was the only contract between the parties, this court should sustain the action of the trial court; because to do otherwise would be to hold that Section 52a of the Federal Rules of Civil Procedure authorizes an appellate court to substitute its own appraisal of the evidence for that of the trial court whenever a suit at law is tried without a jury. But in a case where no party to the action has appealed from the finding of fact of the trial court, nor from any part of the judgment directly based thereon, it would certainly be contrary to the spirit of Section 52a, and a violent reversal of the practice which has heretofore obtained, for the appellate court to substitute its judgment for that of the trial court in determining which of two permissible inferences should be drawn from the evidence.

5. This court erroneously held that the provision in the specifications that the contract should be subject to the written approval of the architect-engineer-manager and the contracting officer, and should not be binding until so approved, was solely for the protection of the government. It is conceded that the reserved right of the government to prevent the parties from contracting by withholding its approval was solely for the protection of the government; but the provision that the approval should be *in writing* was for the protection of the government and both of the parties who proposed to contract.

The object of requiring the approval to be in writing was to avoid the hazards of a lawsuit in which the facts must be determined upon conflicting evidence and inferences to be drawn from the evidence. If the question as to whether or not a contract had been approved was to be determined without written evidence, neither party could be certain whether the contract had been approved or not until the verdict of a jury was returned. It was as important to the appellant that that hazard be removed as it was to the government.

If appellant had brought suit to recover upon a contract with the government in which it was provided that the contract would not be binding until approved by a certain officer, plaintiff would have a right to prove, if it could, that the government had, by its conduct, waived that provision of the contract. It by no means follows that after such a contract is signed the government may maintain suit for breach of the contract upon proof that by its conduct it had waived the written approval by the officer. The defendant would have the right to refuse to recognize the contract until it was approved in writing.

Whether or not both parties proceeded to enter into a contract without the written approval of the contracting

officer, because they both believed that the government had waived the provision for written approval, is a question of fact. The trial court had a right to take into consideration the evidence which showed that appellant proceeded upon the theory that there was no binding contract until it was approved in writing, and that the government officer apparently proceeded upon the same theory by giving his written approval of the formal contract which was finally signed and approved.

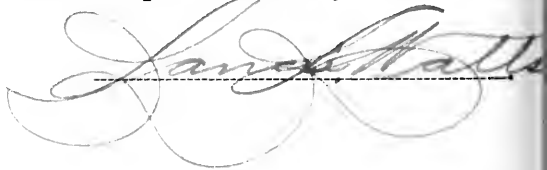
For the foregoing reasons appellant should be granted a rehearing in this cause.

Respectfully submitted,

LANCIE L. WATTS,
801 Scarritt Building,
Kansas City 6, Missouri,
Attorney for Appellant.

CERTIFICATE OF COUNSEL.

Lancie L. Watts, counsel for appellant, certifies that in his judgment the foregoing petition for rehearing is well-founded and that it is not interposed for delay.

A handwritten signature in cursive script, reading "Lancie L. Watts", is written over a horizontal dashed line.

United States
Court of Appeals
for the Ninth Circuit

GERTRUDE I. DOWNING and PERRY LYNN
DOWNING, SR.,

Appellants,

vs.

DOROTHY A. DOWNING and UNITED STATES
OF AMERICA,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

SEP -3 1948



No. 12000

United States
Court of Appeals
for the Ninth Circuit

GERTRUDE I. DOWNING and PERRY LYNN
DOWNING, SR.,

Appellants,

vs.

DOROTHY A. DOWNING and UNITED STATES
OF AMERICA,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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WILBUR, BECKETT, OPPENHEIMER,
MAUTZ & SOUTHER, and
ARNO H. DENECKE,

1001 Board of Trade Building,
Portland, Oregon,
for Appellee;

FRANCIS F. YUNKER,

Journal Building,
Portland, Oregon,
for Appellant.

In the District Court of the United States
for the District of Oregon

No. Civ. 3974

DOROTHY A. DOWNING,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
GERTRUDE I. DOWNING and
PERRY LYNN DOWNING, SR.,

Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action
alleges:

I.

Plaintiff was and is now a resident of the State
of Oregon.

II.

The defendants, Gertrude I. Downing and Perry
Lynn Downing, Sr., were and are now inhabitants
of the State of Oregon.

III.

This action arises under 38 U.S.C.A. 445 as here-
inafter more fully appears.

IV.

Perry Lynn Downing, Jr. hereinafter referred to as the deceased, entered the military service of the United States of America on or about December 9, 1942, and thereafter entered into a contract of National Service Life Insurance in the principal amount of \$10,000.00 with the defendant, United States of America, payable upon his death.

V.

That on the date that the deceased applied for such insurance, he was unmarried, and at that time he designated as the principal beneficiary of said insurance, his mother, the defendant, Gertrude I. Downing and as contingent beneficiary of such insurance, his father, the defendant Perry Lynn Downing, Sr.

VI.

That on or about September 4, 1943, the deceased married the plaintiff. [1*]

VII.

That at some time after said marriage, the exact date being unknown to the plaintiff, the deceased changed beneficiaries of said insurance policy and designated his wife, the plaintiff, as principal beneficiary of said policy and his mother, the defendant, Gertrude I. Downing, as contingent beneficiary.

*Page numbering appearing at foot of page of original certified Transcript of Record.

VIII.

That on or about October 3, 1945, while said insurance was in full force and effect, and when the deceased was in the military service, the deceased was killed and by reason of the aforesaid, the proceeds and benefits of said insurance policy became due and payable to the plaintiff.

IX.

That after said benefits became payable, the plaintiff filed a written claim with the Veterans Administration, and the Veterans Administration decided that the defendant, Gertrude I. Downing, was entitled to the benefits of the insurance.

X.

The plaintiff appealed from said decision of the Veterans Administration to the Administrator of Veteran's Affairs using words showing an intention to claim said benefits and the Board of Veterans Appeals, acting in the name of the Administrator of Veterans Affairs, denied said claim and appeal in an opinion dated October 13, 1947 and numbered Docket No. M-15,798.

XI.

That the proceeds of said insurance policy have been and are now being paid to the defendant, Gertrude I. Downing.

Wherefore, plaintiff prays that she be designated principal beneficiary of said insurance policy, that the Veterans Administration pay to her the benefits of such policy in the amount of \$10,000.00, according to the tenor of the policy, that out of said

benefits the Veterans Administration be directed to pay to [2] plaintiff's attorneys a certain percentage of such benefits determined and allowed by the Court as a reasonable attorneys' fees, and for her costs herein.

WILBUR, BECKETT,
OPPENHEIMER, MAUTZ
& SOUTHER,

/s/ By ARNO H. DENECKE,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah—ss.

Due service of the foregoing Complaint by copy, as prescribed by law, is hereby admitted, at Portland, Oregon, this 3rd day of December, 1947.

/s/ EDWARD B. TWINING,
Attorney for United States.

[Endorsed]: Filed December 3, 1947. [3]

[Title of District Court and Cause.]

ANSWER

Come now the defendants, Gertrude I. Downing and Perry Lynn Downing, Sr., and in answer to the plaintiff's complaint filed herein, admit, deny and allege:

I.

Admit paragraphs I, II, III and IV.

II.

Deny paragraph V except as is hereinafter expressly admitted, qualified or alleged.

III.

Admit paragraph VI.

IV.

Deny paragraph VII.

V.

In answer to paragraph VIII admit that on or about the 3rd day of October, 1945 while the said insurance was in full force and effect, the said deceased was killed while in the military service. Deny each and every other allegation therein contained.

VI.

Admit paragraphs IX, X and XI.

For a further and separate answer and defense, these answering defendants allege:

I.

That this plaintiff and these defendants, Gertrude I. Downing [4] and Perry Lynn Downing, Sr., were at all times herein mentioned and now are inhabitants of the State of Oregon.

II.

That this action arises under 38 U.S.C.A. Section 445 as hereinafter more fully appears.

III.

That Perry Lynn Downing, Jr., hereinafter referred to as the deceased, entered the military service of the United States of America on or about the 9th day of December, 1942, and thereafter en-

tered into a contract of National Service Life Insurance in the principal amount of \$10,000.00 with the defendant, United States of America, payable upon his death.

IV.

That the last change of beneficiary made by the said deceased prior to his death was on or about the 6th day of November, 1943, at which time he designated his mother, the defendant herein, as beneficiary of the said insurance.

V.

That on or about the 4th day of September, 1943, the deceased married the plaintiff herein.

VI.

That on or about the 3rd day of October, 1945, while the said insurance was in full force and effect and while the deceased was in the military service, the deceased was killed and by reason of the aforesaid, the proceeds and benefits of the said insurance policy became due and payable to this defendant, Gertrude I. Downing.

VII.

That the proceeds of the said insurance policy have been and are now being paid to this defendant, Gertrude I. Downing.

Wherefore, defendants, Gertrude I. Downing and Perry Lynn Downing, having fully answered the plaintiff's complaint pray that [5] the plaintiff take nothing thereby and that this defendant, Gertrude I. Downing, be designated as principal beneficiary of the said insurance policy, and that the Veterans Administration continue to pay to her

the benefits of such policy according to the tenor of the said policy, that out of the said benefits the Veterans Administration be directed to pay to the defendants' attorney a certain percentage of such benefits determined and allowed by the court as a reasonable attorney's fees, and for her costs herein.

FRANCIS F. YUNKER,
Attorney for Defendants, Gertrude I. Downing and
Perry Lynn Downing.

Due and legal service of the within answer by receipt of a duly certified copy thereof, as required by law is hereby accepted in Multnomah County, Oregon, on this 26th day of December, 1947.

/s/ A. H. DENECKE,
Attorney for Plaintiff.

[Endorsed]: Filed December 26, 1947. [6]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, by its attorneys, Henry L. Hess, United States Attorney, and Floyd D. Hamilton, Assistant United States Attorney, in and for the District of Oregon, and for answer to the complaint filed herein, says:

I.

The defendant admits the allegations contained in paragraphs I, II, III, IV, V and VI of the said complaint.

II.

The defendant denies each and every allegation contained in paragraph VII of said complaint.

III.

In answer to paragraph VIII of said complaint, the defendant admits that on or about October 3, 1945, while said insurance was in full force and effect, and when the deceased was in the military service, the deceased was killed. The defendant denies each and every other allegation therein contained.

IV.

The defendant admits the allegations contained in paragraph IX of the said complaint.

V.

The defendant admits the allegation contained in paragraph X of said complaint. [7]

VI.

In answer to paragraph XI of said complaint, the defendant admits that some of the proceeds of said insurance policy have been paid to the defendant, Gertrude I. Downing, but at the time of the filing of this ction, such payments were stopped pending the determination of this action.

VII.

For a further and separate answer and defense, the defendant, the United States of America, alleges that said Perry Lynn Downing, Jr., deceased, entered active service of the armed forces on December 9, 1942 and effective November 6, 1943 was granted National Service Life Insurance in the amount of \$10,000.00 which was in full force and effect upon the date of his death, in the line of

duty, on or about October 3, 1945, and that the said Perry Lynn Downing, Jr., deceased, designated Gertrude Irene Downing, his mother, principal beneficiary for the full amount of the insurance and Perry Lynn Downing, Sr., his father, contingent beneficiary, and further the said Perry Lynn Downing, Jr., deceased, before his death, on or about October 3, 1945, married Dorothy A. Downing, his wife, and inasmuch as a disagreement has arisen between the plaintiff, Dorothy A. Downing, and defendants, Gertrude I. Downing, Perry Lynn Downing, Sr., and the United States of America, as to the true beneficiary under the policy of insurance of the insured within the meaning of Section 19 of the World War Veterans' Act of 1924, as amended (Section 445, Title 38, U.S.C.A.), the United States of America admits liability under the said insurance policy, but alleges that its liability is limited to the face amount of the policy, and respectfully requests the court to determine the true beneficiary under the said policy and direct payment to the proper party with a release as to liability to any other party.

Wherefore, the defendant prays:

(1) That the court order the plaintiff and Gertrude I. Downing and/or Perry Lynn Downing, Sr., to interplead their respective claims.

(2) That the court adjudge whether the plaintiff or Gertrude I. Downing and/or Perry Lynn Downing, Sr., is entitled to the proceeds of said insurance policy [8]

(3) That the court discharge defendant from

all liability in the premises except to the person it shall adjudge entitled to the proceeds of said insurance policy.

(4) That the court award to the defendant its costs and such other relief as the court may deem proper.

/s/ HENRY L. HESS,
United States Attorney.

/s/ FLOYD D. HAMILTON,
Assistant United States
Attorney.

United States of America,
District of Oregon—ss.

I, Floyd D. Hamilton, Assistant United States Attorney for the District of Oregon, being first duly sworn, say that I am one of the attorneys for defendant United States of America in the within entitled action and that the foregoing Answer is true as I verily believe.

/s/ FLOYD D. HAMILTON.

Subscribed and sworn to before me this 2nd day of March, 1948.

(Seal) /s/ FLORENCE McKAY,
Notary Public for Oregon.

My Commission Expires Sept. 4, 1951.

United States of America,
District of Oregon—ss.

Due and legal service of the within Answer by receipt of a duly certified copy thereof, as required

by law, is hereby accepted in the State and District of Oregon. on the 2nd day of March, 1948.

/s/ ARNO H. DENECKE,
Attorney for Plaintiff.

[Endorsed]: Filed March 2, 1948. [9]

In the District Court of the United States
for the District of Oregon

No. 3974

DOROTHY A. DOWNING,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
GERTRUDE I. DOWNING and
PERRY LYNN DOWNING, SR.,

Defendants.

FINDINGS, CONCLUSIONS AND JUDGMENT

This matter came on duly and regularly for trial on April 20, 1948, before the Honorable Claude McColloch, Judge, presiding. The plaintiff appeared in person and by Arno H. Denecke (Wilbur, Beckett, Oppenheimer, Mautz & Souther), her attorneys, and the defendant United States of America appeared by Floyd D. Hamilton, Assistant United States Attorney, and the defendants Gertrude I. Downing and Perry Lynn Downing, Sr. appeared in person and by Francis F. Yunker, their attorney.

Evidence was introduced on behalf of the individual parties and authorities were presented and arguments made by the individual parties and the Court took the matter under advisement, and having considered the same and being fully advised in the premises makes the following:

FINDINGS OF FACT

I.

That plaintiff was and is now a resident of the State of Oregon and the defendants Gertrude I. Downing and Perry Lynn Downing, Sr. were and are now inhabitants of the State of Oregon.

II.

That Perry Lynn Downing, Jr. entered the military services of the United States of America on or about December 9, 1942, and thereafter entered into a contract of National Service [10] Life Insurance in the principal amount of \$10,000.00 with the defendant United States of America, payable upon his death.

III.

That on the date Perry Lynn Downing, Jr. applied for such insurance he designated as the principal beneficiary of said insurance his mother, the defendant Gertrude I. Downing, and as contingent beneficiary of such insurance his father, the defendant Perry Lynn Downing, Sr.

IV.

That on or about September 4, 1943, Perry Lynn Downing, Jr. married the plaintiff, and the plain-

tiff continued to be the wife of said Perry Lynn Downing, Jr. until the date of the latter's death.

V.

That after said marriage Perry Lynn Downing, Jr. duly executed a change of beneficiary of said life insurance policy and designated the plaintiff as the principal beneficiary of said policy, but said document was inadvertently lost while it was in the possession of the United States Army.

VI.

That on or about October 3, 1945, while said insurance was in full force and effect and when Perry Lynn Downing, Jr. was in the military service, he was killed and by reason of the aforesaid the proceeds and benefits of said insurance policy became due and payable to the plaintiff.

VII.

That after said benefits became payable the plaintiff filed a written claim with the Veterans Administration and the Veterans Administration decided that the defendant Gertrude I. Downing was entitled to the benefits of said insurance. [11]

VIII.

That the plaintiff appealed from said decision of the Veterans Administration to the Administrator of Veteran's Affairs using the words showing an intention to claim said benefits and the Board of Veterans Appeals, acting in the name of the Administrator of Veterans Affairs denied said claim and appeal in an opinion dated October 13, 1947 and numbered Docket No. M-15,798.

IX.

That a part of the proceeds of said insurance policy have been paid to the defendant Gertrude I. Downing.

X.

That an amount equal to 10% of the amount recovered by the plaintiff is a reasonable fee for the attorneys of the plaintiff.

Based upon the foregoing Findings of Fact the Court makes the following:

CONCLUSIONS OF LAW

I.

That Perry Lynn Downing, Jr. changed the beneficiary of his National Service Life Insurance Policy and designated his wife, the plaintiff, as principal beneficiary of said policy.

II.

That there is legally due and owing the plaintiff from the Veterans Administration the unpaid benefits and proceeds of such policy, to be paid according to the tenor of the policy.

Based upon the foregoing Findings of Fact and Conclusions of Law the Court makes and enters the following:

JUDGMENT

Now, therefore, it is considered, ordered and adjudged that the plaintiff, Dorothy A. Downing, be designated beneficiary of the National Service Life Insurance Policy contracted for by Perry Lynn Downing, Jr.; that the Veterans Administra-

tion pay [12] to the plaintiff, Dorothy A. Downing, such proceeds and benefits of said policy as remain unpaid, such payments to be made according to the tenor of the policy; that the Veterans Administration, out of the payments to be made under this Judgment pay the law firm of Wilbur, Beckett, Oppenheimer, Mautz & Souther sums equaling 10 per cent of each of such payments. Costs to neither party.

Dated this 27th day of May, 1948.

/s/ CLAUDE McCOLLOCH,
Judge.

Entered in Docket May 27, 1948.

[Endorsed]: Filed May 27, 1948. [13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the defendants, Gertrude I. Downing and Perry Lynn Downing, Sr., above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 27, 1948.

/s/ FRANCIS F. YUNKER,
Attorney for Appellants.

[Endorsed]: Filed June 25, 1948. [14]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 19 inclusive constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 3974, in which Dorothy A. Downing is plaintiff and appellee, and Gertrude I. Downing and Perry Lynn Downing, Sr., are defendants and appellants; that the said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellants, and in accordance with the rules of this Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true, and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file at my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony taken April 20, 1948, and filed in this office in this cause, together with exhibits Nos. 1 to 29 inclusive, filed in this cause.

I further certify that the cost of comparing and certifying the within transcript is \$12.55, and the cost of filing the notice of appeal is \$5.00, making

a total of \$17.55, and that the same has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 27th day of July, 1948.

[Seal] LOWELL MUNDORFF,
Clerk. [19]

In the District Court of the United States
for the District of Oregon

Civil No. 3974

DOROTHY A. DOWNING,

Plaintiff,

vs.

UNITED STATES OF AMERICA, GERTRUDE
I. DOWNING and PERRY LYNN DOWN-
ING, SR.,

Defendants.

TRANSCRIPT OF PROCEEDINGS
OF TRIAL

Portland, Oregon

Tuesday, April 20, 1948, 10:30 a.m.

Before: Honorable Claude McColloch, Judge.

Appearances: Mr. Arno H. Denecke (Wilbur, Beckett, Oppenheimer, Mautz & Souther), of Attorneys for Plaintiff. Mr. Floyd D. Hamilton, Assistant United States Attorney, appearing on behalf of the United States of America, Defendant. Mr.

Francis F. Yunker, Attorney for Defendants Gertrude I. Downing and Perry Lynn Downing, Sr.

Mr. Hamilton: May it please the Court, I believe it would be appropriate at this time to give consideration to the prayer of the defendant, the United States of America, wherein we have [1*] asked that the Court order the plaintiff and Gertrude I. Downing and Perry Lynn Downing, Sr., to interplead their respective claims.

I believe it would be appropriate at this time for the Court to so order the parties. I so move the Court.

Mr. Yunker: There is no objection on behalf of the individual defendants.

The Court: Take the appropriate order.

Mr. Denecke: The plaintiff waives any right to the amount of insurance that has already been paid to Mrs. Gertrude I. Downing.

The Court: The record will show that. Are you ready to call witnesses?

Mr. Denecke: Yes, your Honor.

DOROTHY A. DOWNING

the plaintiff herein, was thereupon produced as a witness in her own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Denecke:

Q. You are Mrs. Dorothy A. Downing, the plaintiff in this case? A. Yes.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

(Testimony of Dorothy A. Downing.)

Q. Where do you live?

A. 6552 Northeast Eighth Avenue. [2]

Q. What is your present age?

A. Twenty-three.

Q. Mrs. Downing, you married Perry Lynn Downing, Jr., in September, 1943? A. Yes.

Q. How long had you known Perry Downing?

A. About four years.

Q. You had known Perry Downing about four years?

A. Since I was a sophomore in high school.

Q. Speak louder.

A. Since I was a sophomore in high school.

Q. How long had you—to use the phrase—gone with Perry Lynn Downing, Jr., before you were married?

A. Oh, you say how long had I known him? I had known him ever since grammar school but I had gone with him for four years.

Q. You had gone with him four years?

A. Yes.

Q. But had known him ever since grammar school? A. Yes.

Q. Were you neighbors of Perry Downing's family?

A. Yes, about three blocks from there.

Q. When did you become formally engaged to Perry Downing? A. February 22, 1943.

Q. February 22, 1943? [3] A. Yes.

Q. Where was your husband at that time?

(Testimony of Dorothy A. Downing.)

A. He was in Portland.

Q. Was he in the service yet? A. No.

Q. When did your husband enter the service?

A. He was called away February 26th of that year, 1943.

Q. Of 1943? A. Yes.

Q. Where did your husband first go in the service?

The Court: When were they married?

Mr. Denecke: In September, 1943, your Honor. The engagement, she testified, was in February.

A. He went to Fresno, California, first.

Q. At the time you were married, September, 1943, what was the status of your husband in the Army, do you know? A. He was a student.

Q. He was a student? A. Yes.

Q. What kind of a student?

A. Aviation student.

Q. Where was he stationed at the time of your marriage? A. Santa Ana, California.

Q. Where *were married*?

A. In Santa Ana. [4]

Q. At Santa Ana? A. Yes.

Q. Did you stay and live with your husband, then, after your marriage? A. Yes.

The Court: Are they Catholic people?

A. No.

Mr. Denecke: No, I do not think so, your Honor.

Q. How long were you able to stay with your

(Testimony of Dorothy A. Downing.)

husband from the time you were married? How long did you live with him?

A. Well, all the time except when I came home to have my baby.

Q. When was that? A. In April.

Q. Of what year? A. 1945, I think.

Q. What was your answer?

A. '44 or '45; about '45; yes, '45.

Q. In April, 1945, you came home. You had lived with him, then, from September, 1943, until April, 1945?

A. I came home for a short while, while he was in Victoryville. They couldn't bring their wives there.

Q. You said you were going to have a child. When was that child born?

A. June 20, 1945.

Q. June 20, 1945? [5] A. Yes.

Q. When did you first tell your husband he was going to be a father?

A. Well, when I first knew about it. I think it was in October.

Q. Approximately in the fall of 1944 that would be? A. Yes.

Q. Had your husband ever said anything to you concerning his National Service Life Insurance, commonly called GI Insurance?

A. Only once that I can really remember and that was when we were in Chico. It seems to me it was in January.

(Testimony of Dorothy A. Downing.)

Q. You were in Chico in January. What year was that, do you remember?

A. 1944, I think it was.

Q. January, 1944? A. Yes.

Q. Was it just a short time before you came home to have the baby?

A. Yes. Well, it was 1945.

Q. That would be 1945? A. Yes.

Q. What did your husband say to you at that time?

A. Well, he said he was going to go down and change the beneficiary. [6]

Q. Where did he say he was going to do that, or did he say?

A. Well, it was just the base.

Q. Was going to the base and change the beneficiary?

A. Going to the base and change the beneficiary, and then he came home that evening and said he had, and that was in January.

Q. Of 1945? A. Yes.

Q. Are you certain it was in January, 1945?

A. I can't swear to that, but that is my feeling, I know.

Q. That is your recollection? A. Yes.

The Court: Change it in what way?

Mr. Denecke: Q. Did your husband indicate or say to you how he was going to change his insurance? A. To me.

Q. He was going to change it to you?

(Testimony of Dorothy A. Downing.)

A. Yes.

Q. Did he tell you he was going to change it from whom? Did he tell you from whom he was going to change it? A. No.

Q. Did you know who had been the beneficiary of his insurance up to that time?

A. I surmised it was his mother. I am not sure that it was.

Q. I didn't hear you? [7]

A. I was most sure it was Mrs. Downing or Mr. Downing.

Q. His mother or father? A. Yes.

Q. From that time on, did he ever say anything to you further about his insurance?

A. No, he didn't. He never discussed it.

Q. Did you receive an allotment from your husband? A. Yes.

Q. How much was that allotment?

A. Well, it was \$200 a month, when he was overseas.

Q. That was when he was overseas?

A. Just before he went over.

Q. Let me ask you: Did you receive your husband's death gratuity after his death?

A. Yes.

Q. You came home in April, 1945?

A. Yes.

Q. And your daughter was born in June, 1945?

A. Yes.

Q. When did you last see your husband?

(Testimony of Dorothy A. Downing.)

A. It was in July; it was three weeks after my baby was born that we went down there with Mr. and Mrs. Downing. They took us down.

Q. Where was your husband?

A. Salinas, California. [8]

Q. Had you talked to your husband during that period between April, 1945, and July, 1945?

A. What do you mean, about the insurance?

Q. No. Had you talked with him at all? Had he called you? A. Oh, yes, frequently.

Q. Frequently? A. Yes.

Q. What was the date of your husband's death?

A. October 3, 1945.

Mr. Denecke: Mr. Clerk, would you hand the witness Exhibits No. 5 and No. 21? (Documents handed to the witness.)

Q. I will ask you what those are.

The Court: You can tell what they are. What are they, Mr. Denecke?

Mr. Denecke: If the Court please, Exhibit No. 5 is the Personal Affairs Statement signed by Perry Lynn Downing, Jr.

The Court: There is no dispute between you lawyers as to the contents of any of these exhibits?

Mr. Denecke: No, there is not, your Honor.

The Court: Or their authenticity?

Mr. Hamilton: No, your Honor.

Mr. Yunker: No, your Honor.

The Court: You have examined them among

(Testimony of Dorothy A. Downing.)

yourselves and you all agree they are what they purport to be?

Mr. Denecke: Yes. [9]

The Court: Then you won't need any further testimony about them.

Mr. Denecke: I wanted to bring out the circumstances surrounding the receipt of that.

The Court: Call the number of the exhibit for the record.

Mr. Denecke: You received Exhibits No. 5 and No. 21 from the Army, did you? A. Yes.

Q. It is noted on Exhibit No. 5 that Dorothy A. Downing is the beneficiary of Perry Lynn Downing's National Life—National Service Life Insurance policy. Did you believe that was the notification that you received of his change of beneficiary to you? A. Yes.

Q. And the letter, Exhibit No. 21, the letter of transmittal, states that this was sent to you as beneficiary, does it not? A. Yes.

The Court: What is the date of the letter?

A. January 24, 1945.

The Court: What year? A. 1945.

Mr. Denecke: I hand you Pre-Trial Exhibits No. 4 and No. 20 and will ask you if you received Exhibit No. 4 or a document exactly like is signed by your husband? [10] A. Yes.

Q. Together with a letter of transmittal, Exhibit No. 20, in which it states again that you are the beneficiary? A. Yes.

(Testimony of Dorothy A. Downing.)

The Court: That first letter you have in your hand, where was it addressed to? Where? Portland, Oregon, or where?

The Clerk: Portland, Oregon.

The Court: What is the date?

The Clerk: January 24, 1945.

The Court: Then you were living in Portland when you received that letter?

A. It was sent to my mother, at her home.

Mr. Denecke: Q. It was sent to your mother in Portland? A. Yes.

Q. You were in Chico at that time?

A. Yes, and I had been home.

The Court: He had not gone overseas then?

Mr. Denecke: No, your Honor.

The Court: Did he see that letter?

Mr. Denecke: I don't know, your Honor.

Q. Did you ever show those letters or those Personal Affairs statements, the pre-trial exhibits I have shown you—Did you ever show those to your husband? A. He knew that I had them.

Q. Did he ever see them, do you know? [11]

A. I can't remember that at all.

The Court: He did know you had them?

A. I told him about receiving them.

The Court: What did he say? Did he seem surprised?

A. No. There was really nothing very much said about it at all.

(Testimony of Dorothy A. Downing.)

The Court: Where were they kept? Did your mother keep them? A. Yes.

The Court: Here in Portland? A. Yes.

The Court: She kept them for you?

A. Yes.

The Court: You wanted her to do that for you?

A. Yes.

The Court: Did she have a safety deposit box or something? A. Yes.

The Court: Did she keep them in the family safety deposit box? A. Yes.

The Court: Did you have a father living?

A. Yes.

The Court: What is your father's business?

A. He works for the Iron Fireman, a tool and die maker.

Mr. Denecke: Q. At the time your husband was sent overseas [12] where did he send his belongings?

A. He sent some home to me and one locker to Mrs. Downing.

Q. Some to you and one locker to his mother, Mrs. Gertrude I. Downing? A. Yes.

Q. Do you know what effects Perry Lynn Downing sent to his mother? A. No, sir.

Q. Not specifically, but I mean just in general. Clothes? A. His clothes, yes.

Q. Clothes?

A. Yes, as far as I remember.

Q. Will you speak up louder?

(Testimony of Dorothy A. Downing.)

A. Mostly his clothes.

The Court: How old is this girl?

Mr. Downing: She testified she is twenty-three now, your Honor.

Q. How old was your husband at the date of his death?

A. He was—He would be twenty-one in December.

Q. He would have been twenty-one in December, 1945?

The Court: What high school did you and he attend?

A. He graduated from Benson High School and I graduated from Jefferson.

The Court: That is as far as you went to school, either one of you? [13] A. Yes.

The Court: Did you say your families lived near each other? A. Yes, three blocks.

Mr. Denecke: Q. What did your husband do after he got out of high school in the way of working?

A. Well, he worked in the shipyards.

Q. How long, approximately, did he work in the shipyards?

A. Until he went into the service.

Q. Do you know what job he had there?

A. It seems to me it was boilermaker.

Q. I couldn't hear you, Mrs. Downing.

A. It seems to me he was a boilermaker.

(Testimony of Dorothy A. Downing.)

Q. From that job he went into the service, is that correct? A. Yes.

The Court: Did you go to the same grammar school? A. Yes, we did.

Mr. Denecke: Q. What was your husband's job in the Army?

A. He was an aviation cadet. He was in the Air Corps.

Q. You said he was an aviation cadet. What did he do when he went overseas?

A. He was a flier.

Q. He was a flier? A. Yes.

Q. What was his rank at the time of his death?

A. Second Lieutenant.

The Court: What kind of flying did he do, do you know?

A. Well, he flew a P-38 for a while and then he was on heavier airplanes.

The Court: What was he doing when he lost his life? A. He was flying freight.

The Court: He was a combat flier in the Philippines? Had he gone over as a combat flier?

A. Yes.

Mr. Denecke: Q. Your child is alive and well today, is she not? A. Yes.

Q. Where are you and the child living?

A. With my mother and father.

Q. Here in Portland? A. Yes.

Q. Your husband did go to see his child before he went overseas, is that correct? A. Yes.

(Testimony of Dorothy A. Downing.)

Mr. Denecke: That is all I have, your Honor.

Cross-Examination

By Mr. Yunker:

Q. Mrs. Downing, about this change of beneficiary: Would you tell the Court what was said by your husband? What brought up this conversation in January, 1945? [15]

A. Well, really nothing at all; just came out of a clear blue sky. He said he was going to go down and change his beneficiary. All I said was, "Oh."

Q. Is that all that took place? A. Yes.

Q. That is all the conversation you had?

A. Then, when he came home in the evening, he said he had changed it. I have forgotten what I said, but it was to the effect that it didn't matter.

Q. Who said it didn't matter?

A. I did. I said, "You expect to come back, don't you?"

Q. There was nothing said about who had been the beneficiary, was there, or who was to be the beneficiary? A. No.

Q. There was nothing said?

A. Yes, he said that he was going to change it to my name.

Q. Take it out in your name? A. Yes.

Q. At that time you had been married for almost two years, hadn't you? A. Yes.

Q. Had he ever mentioned insurance before that?

(Testimony of Dorothy A. Downing.)

A. Neither one of us did, as far as I can remember.

Q. Was there anything that brought up the subject in January?

A. No, only the fact, I imagine, that it was about the time [16] when the fellow had to change their—not change, but to fix up their personal affairs. That is the only thing I can figure out why he was planning doing that, but I had not ever said anything to the effect that I wanted him to do it.

Q. How do you place this date as January, 1945?

A. Well, I can remember it this way, that we were in this home and then we moved to another place, and it seems to me it was in just about that time.

Q. About that time? A. Yes.

Q. Aren't you basing it upon these Personal Affairs statements introduced in evidence, No. 5 and No. 21?

A. No, I am not. Well, I just don't know, but that was the way I had figured it out, because we only had about three months to live in this last apartment before we would have to give it up.

Q. Did you see your husband after that, after you left Chico and came back to Portland to have the baby? A. Yes.

Q. When did you again see him?

A. Just before he went. It was about in June, I believe.

(Testimony of Dorothy A. Downing.)

Q. Did he come up on a furlough?

A. Yes, April.

Q. Did you discuss this insurance in any way at that time? A. No, not at that time. [17]

Q. Did you discuss these documents, these Personal Affairs statements at any time after that conversation in January, 1945?

A. Well, yes, just that I told him that I had received them. That is the only thing that I said.

Q. Did you tell him that by letter or by conversation? A. No, by conversation.

Q. When was that?

A. When he was here in Portland.

Q. When he came to Portland, wasn't there a little difficulty between you and your husband?

A. No, there wasn't.

Q. Where did he stay when he came home on that last furlough?

A. With me. What do you mean, where did he stay?

Q. Didn't Mr. Downing stay at his mother's home?

A. Well, we took turns. He stayed home and then he stayed at Mrs. Downing's home.

Q. As a matter of fact, didn't he stay at his own home and you stay at your home?

A. No.

Q. Are you sure?

A. I certainly can't remember it.

Q. Do you remember an incident when he came

(Testimony of Dorothy A. Downing.)

home on his last furlough, when you refused to go to dinner with him at one of his relatives? [18]

A. I can't remember that.

Q. When Lieutenant Downing left for overseas --That was about July, wasn't it, 1945?

A. Yes.

Q. ---of course, his personal belongings were sent home, weren't they? That is correct?

A. Yes.

Q. He had a trunk, didn't he? A. Yes.

Q. Where did that trunk go?

A. One trunk went to me and one to Mrs. Downing.

Q. What was the nature of the trunk that his mother got, do you know?

A. Well, clothes, mostly.

Q. What is that? A. Clothes, I guess.

Q. What was in the trunk that you got?

A. Well, it was his clothes that he wore right at the last that were in Mrs. Downing's trunk and the ones--Well, kind of had them half--You know--

Q. What was in the trunk that you got?

A. Well, his uniform.

Q. That is all, just his uniform?

A. No, had some of his shirts, and I gave Mrs. Downing some of his things. [19]

Q. However, the trunk that contained his personal belongings went to his mother? A. No.

Q. Didn't you go over to the Downings, that is,

(Testimony of Dorothy A. Downing.)

Lieutenant Downing's mother, and go through that trunk and take what you wanted?

A. There was just a few little things like—only dirty clothes that he had put in the trunk.

Q. Wasn't there a book, a little memorandum book there? Isn't that right? A. Yes.

Q. Wasn't that book the cause of a little trouble between you and your husband? A. Yes.

Q. As a matter of fact, Mrs. Downing, didn't you consult an attorney about a divorce?

A. No, I didn't.

Q. Did you write to your husband that you were planning to?

A. No. I said to him—I told him I found this book and if it was true that it just couldn't go on, but I said if I was accusing him unjustly I probably would regret it for the rest of my life. I didn't say anything that I was planning on getting a divorce. I just said it could not go on that way.

Q. How long did this trouble continue? Didn't it continue [20] on?

A. Just for a short time.

Q. How long?

A. I think it was about—Let's see—about a month and a half, I believe it was.

The Court: Look, Mr. Yunker. This is all after the time they claim he changed the beneficiary.

Mr. Yunker: That is correct, your Honor. However, what I want to connect up is this: These letters relate to this affair and also he says in there

(Testimony of Dorothy A. Downing.)

that "We never did get along from the beginning," from the time they were first married. I appreciate the suggestion, your Honor.

Q. As a matter of fact, did your husband decide he was going to stay in the service for thirty years?

A. Well, he wrote me a letter to that effect and asked me what I thought about it. He said it was my life, too. That was after we had the argument.

Q. Didn't he say that from the beginning, while he was in the States?

A. He had talked some about it but I tried to talk him out of it because I didn't care for a flying life.

Q. He talked about staying in the service as a career while he was in the States, didn't he?

A. Well, he was—I don't know—Neither one of us knew.

Q. But he spoke of it, didn't he? [21]

A. Yes, he spoke of it.

Q. At that time were you getting along all right, when he said he was going to stay in the service?

A. Yes.

Q. What reason did he give for wanting to stay in?

A. So he would have a more secure life. I have a letter in which he said that.

Q. Mrs. Downing, I want to ask you this: When this money for the insurance came in to Mrs. Down-

(Testimony of Dorothy A. Downing.)

ing, your mother-in-law, you knew what she did with the money, didn't you?

A. I believe she put it in the bank.

Q. In the name of your child?

A. I don't know what name she put it in.

Q. Has she used any of that money that you know of?

A. She told me she had to buy insurance for Linda, part of it.

Q. Didn't Mrs. Downing tell you her sole purpose was to see that Linda got an education?

Mr. Denecke: I don't think that is pertinent here, and I object to this testimony.

The Court: Go ahead. Ask your question again.

(Question read.)

Mr. Yunker: Q. Isn't that right?

A. Well, I imagine that is what it was for; I don't know. She seemed very nice all the way through until—about the [22] whole thing—She seemed to want Linda to have it.

Q. What is your purpose in case the Court should decide you are entitled to the insurance? What would you do with this money?

Mr. Denecke: I object to that question, your Honor, on the ground it is not relevant at all.

Mr. Yunker: I am showing the motive here, that is the only thing.

The Court: She may answer.

A. I had not really thought much about it, other than taking care of my child.

(Testimony of Dorothy A. Downing.)

Mr. Yunker: Q. As a matter of fact, isn't it your intention, if you prevail, to ask for a lump-sum settlement from the Government?

A. No, I have not talked that over. We have discussed it but were not set on it.

Q. What was your purpose—What would be your purpose in having a lump-sum payment?

Mr. Denecke: I do not wish to be objecting all the time, but I cannot see the relevancy of this. She said she was not going to ask for a lump-sum payment. As a matter of fact, she couldn't get a lump-sum payment under the rules and regulations of the War Department, so I don't see that there is any relevancy.

The Court: You would get a judgment? You want to take a [23] judgment, don't you?

Mr. Denecke: I do, your Honor.

Mr. Yunker: What did you discuss this lump-sum insurance for?

A. When do you mean? When did I discuss it? When I was at the Veterans Bureau, I had asked for a certain amount a month and then, when Mr. Denecke and I discussed it, we didn't exactly—I didn't make any decision. He told me how I could get it, the way I could get it.

Q. Mrs. Downing, you testified you got these forms, Exhibits No. 5 and No. 21 I think, and that those were designations of you as beneficiary?

A. Yes.

Q. Did you read these statements?

(Testimony of Dorothy A. Downing.)

A. Yes, sir, I did.

Q. I will hand you Exhibit No. 4. At the bottom of the back page, I will ask you to read that portion. Did you read that when you got it?

A. Yes, I read it.

Q. Referring to Exhibit No. 5——

The Court: What is that?

Mr. Denecke: That portion, you mean?

The Court: On the bottom of Exhibit No. 4.

Mr. Yunker: It is the same as it is at the bottom of Exhibit No. 5. [24]

The Court: What is it?

Mr. Yunkers: "Instructions: AAF Personal Affairs Statement is not to be used, either as a substitute for, or in lieu of authorized forms or established procedures for effecting desired personal affairs actions. The purpose of this form is to provide a consolidated record of all personal affairs actions taken by previous accomplishment of official forms. Accordingly, prior to signing this statement, any action will be accomplished in the prescribed official manner."

A. No, I didn't read that until later on when we were discussing this.

Mr. Yunker: Q. What was there about these forms that made you think that they were designations of you as beneficiary?

A. They were from the Government.

Q. You have been friendly with your mother-in-law? A. Yes, I have.

(Testimony of Dorothy A. Downing.)

Q. You and she have discussed this insurance problem, have you not? A. Yes, we have.

Q. I will ask you whether or not you have ever seen Exhibits 14, 15 and 16 which the Clerk will show you.

The Court: What are they?

Mr. Yunker: I don't know what their proper designation is. This form certifies the insurance is in effect. It is [25] the prescribed form for notifying the assured that the insurance is in effect. I think it has the same effect as a policy.

The Court: Whom is it signed by?

Mr. Yunker: Signed by the War Department.

The Court: All right.

A. I have never seen these before.

Mr. Yunker: Q. Haven't you and Mrs. Downing, your mother-in-law, discussed this insurance?

A. Yes, but I never have seen these forms before.

Q. Hasn't Mrs. Downing ever shown these to you? A. No, she has not.

Q. Didn't she ask you whether or not you ever received one of those?

A. After it was all over with; she never did before but after I went—She and I went down to find out about it, yes.

Q. Mrs. Downing, you did see these before, didn't you?

A. No, I never have seen these before.

Q. She never showed these to you?

(Testimony of Dorothy A. Downing.)

A. No.

The Court: Before what? She is mixed up.

Mr. Yunker: Q. Before now?

A. I have never seen these before now, no.

Q. You did not see them at the Veterans Bureau before? [26] A. No, I have not.

Q. Have you ever seen any National Service Life Insurance forms such as these are?

A. No. That is what made me believe that this was enough.

Q. After your husband's death, you knew your mother-in-law was applying for the insurance, did you not?

A. She went down with me to find out about it and she seemed like she was very willing for me to have it very much.

Q. You mean she wanted you to have it?

A. She thought that I was—that I should have it.

Q. Was there any question about you having it?

A. Not until we went down and then they declined—I had no idea that we would need any of these. Then, when we went down there and I got a letter from the Veterans stating that Mrs. Downing was the beneficiary——

Q. How much money are you now receiving from the Government for the support of the child?

A. \$78.00.

Q. \$78.00? A. For myself and the baby.

Q. Are you engaged at the present time?

(Testimony of Dorothy A. Downing.)

A. No, I am not.

Q. Engaged to be married?

A. No, I am not.

Q. After the death of your husband, didn't Mr. Downing proceed [27] to sell the car belonging to your husband and give you the proceeds thereof?

A. Yes.

Mr. Yunker: That is all.

Cross-Examination

By Mr. Hamilton:

Q. I would like to ask you this, Mrs. Downing. At the time you and your husband were at Chico, was he a Second Lieutenant then?

A. He was made a Second Lieutenant while we were in Chico.

Q. That represented the final stage of his training as a pilot, is that right?

A. Well, he was made a Flight Officer before, when he graduated; then, when we went to Chico-- I believe it was in May. No. It was just before we left that he was made a Second Lieutenant.

Q. At Chico, do you know whether or not he was training, or what was he doing there? What was his purpose in being there?

A. He was flying P-38s.

Q. In order to get experience in flying that type of plane, is that right? A. Yes.

Q. After he left Chico did he go any place in the United States or did he go overseas?

A. No, he went to Santa Maria, California, and then he went to Salinas. [28]

(Testimony of Dorothy A. Downing.)

Q. Do you know what month he left Chico?

A. I can't be sure. Must have been June.

Q. It was in June. What month did he go overseas?
A. In July, July 27th.

Q. In July? A. Yes.

Mr. Hamilton: That is all.

Redirect Examination

By Mr. Denecke:

Q. Was your husband alerted for overseas movement in December, 1944, or January, 1945?

A. Yes.

Q. Do you know if this was the first time he was alerted for overseas movement?

A. No, he had been alerted quite often.

Q. Both before your husband went overseas and after he went overseas, you received letters from him, did you not?
A. Yes, sir, I did.

Q. In those letters, before he went overseas, he indicated to you he was very happy being married to you, did he not?
A. Yes.

Q. I hand you Pre-Trial Exhibit No. 23, a letter dated July 10th addressed "My darling wife and baby," and ask you if you received this letter from your husband?

The Court: That has all been agreed to. Put them all in. [29] They speak for themselves. You agreed among yourselves that all exhibits are what they purport to be, and the letters are received. You may pick those out for emphasis, if you want to emphasize them in the argument, if you wish.

Mr. Denecke: All right, your Honor.

(Testimony of Dorothy A. Downing.)

Q. When you and Mr. and Mrs. Downing, Sr., were in Salinas to see your husband off, did your husband say anything to his mother about insurance?

A. Not when we were in Salinas but when they drove off in the car, going to Salinas.

Q. When you were driving in the car?

A. Yes.

Q. When was this, or where was it?

A. Well, it was—I can't tell you just exactly where it was but it was going to Salinas from Portland.

Q. It was in the vicinity of Salinas?

A. Well, it was near there, when we were nearing there.

Q. Who was in the car at that time?

A. Mr. and Mrs. Downing, myself, and there was another boy named "Chuck." I can't remember his last name.

Q. What did your husband say to Mrs. Downing concerning this insurance?

A. Well, he said he had everything all straightened out and that everything would go to me anyhow. He knew everything would go to me anyhow.

Mr. Denecke: That is all, your Honor.

Recross-Examination

By Mr. Yunker:

Q. Did your husband, down at Salinas in that automobile, in the presence of the other Downings, say that he had made everything out to you?

(Testimony of Dorothy A. Downing.)

A. As far as I can remember, he certainly did.

Q. What brought up that conversation?

A. Mrs. Downing asked him.

Q. She asked him what?

A. If he had put everything—had gotten all his affairs straightened out. I can't remember the exact words.

Q. As a matter of fact, wasn't this the conversation: They asked if his affairs were in order and he said, "Yes."?

A. There was more to it than that.

Q. Well, how much more? I am not trying to badger you. I would like to know. It is important.

A. Well, we have affidavits to that effect.

Q. I see. How do you remember it?

A. Because we were driving in the car—

Q. How do you remember this conversation? Tell us what it was?

A. I don't know exactly how I could tell you the exact words but I do know we were in the car, and this other boy was with us. [31]

Q. Mrs. Downing, isn't it a fact, isn't that the time when you and Mr. and Mrs. Downing drove down to see him before he left? A. Yes.

Q. Isn't that right? A. Yes.

Q. When you first saw him—

A. Wait a minute—It was after, when we were with them. We met them in Chico and then we went to Salinas and then took him with us to Salinas.

(Testimony of Dorothy A. Downing.)

Q. That happened in Chico, didn't it?

A. Yes.

Q. As a matter of fact, when you first saw your husband when you drove down that June, when you first saw him, what did he say? What I am trying to get at is this: He kissed his mother first, didn't he? A. No, he didn't.

Q. Did he kiss you or talk to you at all?

A. Yes, he did. He came up to the window and said, "Hello" to Mrs. Downing and came back to me. He said "Hello" to all of us, and then came over.

Q. And he drove down the road in the front seat with his father?

A. I was back near the baby when he rode in the front seat, because this other boy was there.

Q. Didn't you and your husband have an argument over the fact that he did not greet you properly or was not friendly enough to you?

A. No, we didn't. I was hot and tired, I know that, but that was the only thing. We never had any words. I had just gotten out of the hospital.

Mr. Yunker: That is all.

The Court: That is all.

(Witness excused.) [33]

GLENN BAUMAN

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

(Testimony of Glenn Bauman.)

Direct Examination

By Mr. Denecke:

Q. You live in Portland, Mr. Bauman?

A. Yes, sir.

Q. Where is your residence?

A. 4720 Northeast Davis.

Q. How long have you lived in Portland?

A. Since I returned from the service.

Q. In the service did you know Perry Lynn Downing, Jr.?

A. Yes, sir, I did.

Q. You were in the same outfit he was in the service?

A. Yes.

Q. How long were you in the same outfit with him?

A. We were stationed together at Chico for the whole time we were there.

Q. When did you come to Chico?

A. We entered Chico in October, 1944.

Q. Did you know Lieutenant Downing quite well?

A. Yes, sir, I did.

Q. Did he ever say anything to you about his GI insurance?

A. Yes, we had discussed it, oh, at least once that I can remember of. [34]

Q. What did he say to you on that occasion?

A. Well, it happened right after our leave up here in April of 1945. We had gone back—We had flew back from here—and we were prepared to go overseas; we were alerted at the time, and he had

(Testimony of Glenn Bauman.)

told me that he was going to change his beneficiary—change his insurance. I had known at the time that his mother was beneficiary before that, and both of us went in at the same time to change.

Q. Went in where?

A. In Headquarters, in Chico, California.

Q. This conversation——

The Court: Wait a minute. He said both of them went in at the same time to change insurance. He started to tell something about it.

A. Yes, both of us did.

The Court: That is the sentence or wording you used a minute ago. A. That is right, sir.

The Court: Then you were interrupted in some way. Go on and finish. When did that happen?

A. That happened right after our leave in Portland here in April, 1945.

Mr. Denecke: Q. Then, what happened?

A. We went in and, as far as I know, he changed his insurance. I know he filled out——

Mr. Yunker: That is objected to.

The Court: Just state what you know.

A. We went in and, as far as I know, he filled it out. I didn't pry into his affairs. I didn't think it was any of my business, but he had told me after we came out that he had everything straightened out as far as his insurance was concerned. I didn't ask him whether it was to his wife or whether it was to his mother, but I took it it was for his mother—I mean, for his wife, rather.

(Testimony of Glenn Bauman.)

Q. At that time did you fill out a Personal Affairs Statement? A. Yes, sir, I did.

Q. You went to Headquarters. Was that the place that soldiers would go to make a change of insurance beneficiary?

A. That is the only place.

Q. Did he indicate to you beforehand to whom he was going to change his insurance?

A. No, he didn't say exactly, but he said he was going to change his beneficiary.

Q. Did he say afterwards, when he came out of Headquarters—What is your best recollection of what he did say?

A. Well, he said he had taken care of it. I presumed he had changed it because that is what he told me he went in—That is what he told me before we went in.

Q. Did he say anything further?

A. Not exactly that I remember of. That is about all that [36] was said.

Q. I hand you Exhibit No. 19. That is a Personal Affairs Statement signed by you. Is that the Personal Affairs Statement you received, the one you made out this time you went in with Lieutenant Downing? A. No, it is not.

Q. It is not?

A. No, it is not. This is—Wait a minute. Yes, it is. 31st of May. I take that back. It is.

Q. That is dated the 31st of May, 1945?

A. That is right.

(Testimony of Glenn Bauman.)

Q. At the time you and Lieutenant Downing went in Headquarters and made these declarations you mentioned, you received later a copy of this Personal Affairs Statement?

A. Yes, sir, I did.

The Court: What is your point about that?

Mr. Denecke: Your Honor, we have no Personal Affairs Statement dated the 31st of May. We have no document dated at that time. My only conclusion is that apparently they lost any document that Lieutenant Downing filled out at that time.

The Court: I still do not follow you. What is the evidential value of what you just said?

Mr. Denecke: It fixes the date, your Honor, when Lieutenant Bauman went into Headquarters at the time Lieutenant Downing went into Headquarters. [37]

The Court: He said that is not the one.

Mr. Denecke: And then he changed his testimony, your Honor.

A. Yes.

Mr. Denecke: Q. How long were you together with Lieutenant Downing before you went overseas?

A. Well, actually, he and I were together from the time we left Portland here in April until—It was approximately the 2nd of June of 1945 when we left for overseas. I left before he did from Santa Maria, California.

Q. What year was that? A. April, 1945.

Q. During that time you were with him, did he

(Testimony of Glenn Bauman.)

ever tell you that he and his wife were not getting along?

A. No, he didn't. He never mentioned anything about it.

Q. During that period from April, 1945, until you went overseas, were you the only two left at Chico of the old outfit?

A. No, there was approximately fifteen of us, I believe, but he and I were more so together than myself and someone else.

Q. When you and Lieutenant Downing were in Headquarters, at the time you referred to, did he make out some document of some sort?

A. Yes, he did.

Mr. Denecke: That is all, your Honor. [38]

Cross Examination

By Mr. Yunker:

Q. How do you know he made out any document?

A. The reason I know is because we were forced to make them out at the time. In other words, we were told that we must make them out before we would go overseas.

Q. When had you made your last Personal Affairs Statement before May 31st?

A. When did I make one out before that?

Q. Yes.

A. I believe it was in December, the year before.

Q. The only reason you have for thinking that Lieutenant Downing made out a Personal Affairs

(Testimony of Glenn Bauman.)

Statement is because everybody else was told to make them out?

A. That is right. You could not clear the base unless you made one out.

Q. Did I understand you to say the date of this conversation was May rather than March?

A. May, I believe.

Q. This Personal Affairs Statement you refer to shows it was made out on May 31st, 1945, is that correct? A. Yes, right.

Q. Is that the date you had the conversation then, rather than in March, as you first testified?

A. No, I didn't testify that we made it in March.

Q. Or April, 1945, rather?

A. That is right.

Q. He told you, then, in May, 1945, that his mother was the beneficiary under the policy at that time, didn't he? A. No, he didn't.

Q. What did he say?

A. I had known it before he had gone in and made that—Before we went in, we lived here in Portland and I had known his mother was the beneficiary.

Q. Was his mother the beneficiary to your knowledge in January or February, 1945?

A. She must have been. He told me in April.

O. He told you in April that his mother was the beneficiary prior to that time? A. Yes.

Mr. Yunker: That is all.

Cross Examination

By Mr. Hamilton:

Q. When you went into Headquarters at Chico

(Testimony of Glenn Bauman.)

concerning this Personal Affairs Statement, making out this Personal Affairs Statement, Lieutenant Downing accompanied you. Did you see him fill out any form or anything?

A. Yes, sir, I did.

Q. You saw him? Was he seated?

A. No, we were standing up. [40]

Q. Standing up? A. Yes.

Q. You were together? A. Yes.

Q. You can testify that he filled out some paper at that time, is that correct? A. Yes, he did.

Mr. Hamilton: That is all.

Recross Examination

By Mr. Yunker:

Q. How many people were in this room at the time you were making out the forms?

A. I wouldn't say.

Q. Who else was there besides you and Downing? A. Lieutenant Bruce Kummer for one.

Q. Did he make out a form?

A. Yes, he did.

Q. You remember he was making out a form at the time? A. Yes.

Q. How do you remember he was making out a form at the time?

A. Because the three of us were together at the time. That is what we went in there for.

Q. You say you made a Personal Affairs Statement prior to that time, in December, 1944?

A. Approximately. [41]

(Testimony of Glenn Bauman.)

Q. Who was in the office with you at that time?

A. I would not even remember.

Q. What caused you to remember the occasion in 1945?

A. Because we had been in Chico, the three of us, and there was—well, about six or seven families that knew each other pretty well, and we had been running around down there together; there were approximately six or seven of us, I would say, down there that were together most of the time in the evenings or else meeting some place.

Q. Were you married at the time?

A. Yes, I am.

Q. At that time, were you married?

A. Yes, I was.

The Court: Your wife was down there with you?

A. Yes, sir.

The Court: You were running around together, you say?

A. That is the reason that I remember it, because we were together most of the time.

Mr. Yunker: Q. You have no independent memory of this particular event taking place on May 31, 1945, have you? A. Not me, no, sir.

Q. The Clerk will hand you Exhibit No. 19. Would you look at that and see if that is the date that was executed.

A. That is the date I received it.

Q. Where is the date shown when it was executed? [42]

A. Well, I say, I didn't know the date but I

(Testimony of Glenn Bauman.)

know that this was made out in order to come out the 31st of May, 1945. We didn't receive these when they were made out.

Q. If you will read that, doesn't that say that this is your status on the 31st—as of the 31st day of May, 1945?

A. That is right. We would go in and fill out our forms and they would type them up and put down the date when this thing was to take effect.

Q. When what thing was to take effect?

A. Well, the Personal Affairs Statement.

Q. If you will look at that, Mr. Bauman: That is only a statement, is it not, of what your situation was and who your beneficiary was?

A. That is right.

Q. There is nothing to take effect on that Personal Affairs Statement, is there?

A. What do you mean, "take effect"?

Q. You say that statement was made out and it was to take effect May 31st. As a matter of fact, it was executed on May 31st, was it not?

A. That is right.

Q. It was made out on May 31st and signed by you on May 31st? A. Yes.

Mr. Denecke: I think counsel is misleading the witness, because it does not state it was executed on May 31st. [43]

The Court: I wonder if I understood you correctly when you first came on the stand. You said you went in to change your beneficiary?

A. That is right.

(Testimony of Glenn Bauman.)

The Court: To change the beneficiary of your life insurance?

A. No; mine was remaining the same, but I was adding another beneficiary on it.

The Court: You say you and the deceased Lieutenant were discussing insurance and you both went in on the same mission.

A. That is right, sir.

The Court: Among other things, but particularly as to that?

A. Yes.

Mr. Yunker: Q. Who had been your beneficiary prior to this statement?

A. Mine?

Q. Yes.

A. My wife.

Q. Your wife. Who was your contingent beneficiary before that?

A. My wife was my beneficiary from the time I graduated.

Q. Who was your contingent beneficiary?

A. My mother and father.

Q. How did you change it when you went in?

A. To my son.

Q. You added your son?

A. That is right.

Q. And took your mother and father off?

A. That is right.

Q. Mr. Bauman, isn't it true that according to this Personal Affairs Statement, the statement that you signed shows your wife is beneficiary and your father and mother are contingent beneficiaries?

A. That is right. It is on here.

Q. What do you mean when you say you went in to change your beneficiary? Your wife had been principal beneficiary and your mother and father

(Testimony of Glenn Bauman.)

contingent beneficiaries. You went in and changed it by this document and it still remains the same. Can you explain that?

A. I must have changed mine at a later date.

Q. Then this conversation and everything you are speaking of refer to that different date?

A. No, I just said the last part of it, the part of it about changing the beneficiary.

Q. As far as you know now, you had no conversation at that time about it?

A. Oh, yes, we did.

Mr. Yunker: That is all. [45]

Redirect Examination

By Mr. Denecke:

Q. What was the date of your leave and Lieutenant Downing's leave in April?

A. April 12, 1945.

Q. How long a leave was it?

A. Until the 27th.

Q. You got back in Chico on the 28th?

A. I believe it was the 28th.

Q. And this conversation with Lieutenant Downing you are certain took place after you were both on leave? A. Yes, it did.

Q. This conversation relating to the change of beneficiary that I am referring to, that is the one that took place after your leave?

A. Yes, that is right, sir.

Mr. Denecke: That is all, your Honor.

(Witness excused.)

Mr. Denecke: The plaintiff rests.

The Court: How about your exhibits? Have you put your exhibits in?

Mr. Denecke: I will offer all pre-trial exhibits, your Honor, in evidence as trial exhibits.

The Court: Do you wish to reserve objections to the [46] exhibits?

Mr. Yunker: Well, we do, your Honor. We have not looked at them all. I wonder if we might have time to look at them.

The Court: You can do that during the noon hour.

Mr. Yunker: All right.

The Court: Mr. Denecke, you rest now, subject to any objection to the exhibits?

Mr. Denecke: Yes, your Honor. I do not think there will be any difficulty.

The Court: You gentlemen settle that during the noon hour. Go ahead with your testimony, Mr. Yunker. [47]

TESTIMONY OF DEFENDANTS GERTRUDE

I. DOWNING and PERRY LYNN DOWNING, SR.

PERRY LYNN DOWNING, SR.,

was thereupon produced as a witness in his own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Yunker:

Q. Mr. Downing, you are one of the defendants

(Testimony of Perry Lynn Downing, Sr.)

in this case and the father of Perry Lynn Downing, Jr.?

A. That is right.

Q. Mr. Downing, when did the boy get married, do you remember approximately?

A. He got married on my 25th anniversary. That would be the 4th of September, 1943.

Q. Did he come back on furlough or visit you at any time?

A. Yes.

Q. When was that?

A. Well, let's see. He was home on one furlough for two weeks right along in April. I know we went fishing, salmon fishing.

Q. Was he married at that time?

A. Yes.

Q. April, 1945?

A. Wait a minute. Was he married? He evidently was married in 1944—1943. [48]

Q. He came back on a furlough. How long did he remain?

A. He was around two weeks, I think it was, or ten days, something like that; right around in there.

Q. Where did he stay when he came home?

The Court: Wait a minute. When was he married?

Mr. Denecke: September, 1943, your Honor.

The Court: Let's don't flop around about such a small thing. We are all agreed on that date?

Mr. Yunker: That is correct.

The Court: Get it straightened out, to be sure.

Mr. Yunker: Q. He was married in September, 1943?

A. Okeh.

Q. Where was he married?

(Testimony of Perry Lynn Downing, Sr.)

A. He was married at Chico, California.

Q. Was it Santa Ana or Chico?

A. Santa Ana.

Q. Then it was the next year or the following year that he came home, 1944 or 1945?

A. He was home twice. He came home and we went salmon fishing. He was married at that time, I am sure. Then he came home another time after that date.

Q. The time he came home after he was married?

A. Yes.

Q. Where did he live?

A. Stayed at our place and over at his wife's mother's place. [49]

Q. Did they stay together at all times, he and his wife, or not?

A. Most of the time.

Q. Was there any time he came home and stayed alone at night?

A. Well, yes, there was.

Q. Did you hear or notice anything about the manner in which he and his wife were getting along at that time?

A. At that time I didn't notice anything. He would never say anything. He kept everything quiet to himself.

Q. Then, when did you first notice anything?

A. Well, when we went down to see him off. We was not supposed to be down to see him, but we went down to Chico and, well, the first time I noticed is when I wanted him to take some fish over to his wife's folks and he said, "No, give them nothing," and I thought it was funny. I never

(Testimony of Perry Lynn Downing, Sr.)

asked any questions. As it was, I got him to take some fish over, anyway—I had three fish, and there was three of us fishing and I wanted to give each one a fish but he wouldn't take it. He said, "Nothing doing." I thought that was funny.

Q. Then what was the next thing?

A. Then, when we went down to Chico to see him, we missed him at the airport. He was to be at the airport. He was up at the swimming tank, and we were hot and tired and we went into Chico to get something to eat and he had heard about us [50] being there on the loud speaker, and he came in, right in behind us, and as he glanced back he noticed it was us, and he came back and kissed his mother and ignored Dorothy. I thought it was funny but I never asked any questions.

Q. Did that cause some difference between him and his wife at that time? A. Sir?

Q. Did that cause a little argument?

A. She didn't like it very well, but I never said nothing because I didn't want them to have any trouble.

Q. Of course, you received letters from your son explaining the situation of how he felt towards his wife? A. I did afterwards, yes.

Q. When your son was overseas who got his personal effects, do you know? Whom did he send them to?

A. There was one trunk came out to our house with his personal effects, all his papers and everything.

(Testimony of Perry Lynn Downing, Sr.)

Q. Personal effects and papers? A. Yes.

Q. All were sent to you?

A. Yes. There was no key. He had taken the key with him. Anyway, we didn't have a key and I opened the trunk and I think there was a blouse in there, and the first thing his wife did was to pick up a notebook—pulled out a little address book and opened it up, and there was some names in [51] there, some girls, and she said, "That is all right, Mr. Downing," and out she went. All his papers and everything was in that trunk.

Q. Were all his personal papers in that trunk?

A. Yes.

Q. They were sent to your home?

A. They were sent to our house. I don't know how they were addressed, but must have been addressed there or they wouldn't have come.

Q. This money that has come in from this insurance, where is that money now?

A. That money is in the bank. \$600 went for an insurance policy for his little girl, and that will be a \$3,000 policy and will be paid for when she is eighteen years old for an educational fund. The balance is in the bank.

Q. The insurance policy is on whose life?

A. It is on my wife's life.

Q. Payable to whom?

A. To Linda Downing.

Q. That is your grandchild, the child of your son? A. That is right.

Q. Is the money kept in some sort of fund?

(Testimony of Perry Lynn Downing, Sr.)

A. It is kept in a joint bank account in the California Bank.

Q. How is that account made up? In what names?

A. To Gertrude, I think it is—I am not exactly sure, but I [52] think it is to the wife and I for Linda Downing. All that money is to her account and we are the ones that are on there with her.

Q. You are trustees for the child?

A. That is right.

Q. Is that all fund intact except what you spent for insurance?

A. That is right, every bit of it.

Q. Is that your intention, to keep the fund in that manner?

A. That is right. I want her to get an education out of it, because we promised the boy at Chico, just before he left, that if I had one cent left I would see that the little girl got an education, for him not to worry, because there was some worry on his part when I talked to him at Salinas. He didn't open up and say anything, but I knew there was something worrying him. I said, "Are you afraid of these Japs?" And he said, "No, I am not afraid of them." I said, "Afraid of the planes?" And he said, "No, the planes are all right. That is up to the pilot." I knew something was worrying him but he wouldn't say anything. He never did talk to anybody or say anything. I said, "If you are worrying about your family, as long as I have got anything I will see that she gets

(Testimony of Perry Lynn Downing, Sr.)

taken care of some way or another.” That is all I could do.

Q. Have you made a will, protecting that bank fund?

A. That is in my will for the granddaughter, every single dollar; she gets every bit of it. [53]

Q. You want no part of the fund yourself?

A. Sir?

Q. Do you want any part of this fund yourself?

A. No.

Q. Are you willing that that fund should be tied up in any manner for the protection of the child?

A. That is right. I don't want anybody else to get hold of it and throw it away. I want to see that she gets an education out of it, because that is all I can do for her.

Mr. Yunker: You may examine.

Cross Examination

By Mr. Denecke:

Q. You say you know he sent his personal effects home in a trunk. Do you know what was in the trunk that came to his wife?

A. What was in the trunk?

Q. Yes.

A. There was a lot of papers in there, personal papers and Army papers and records.

Q. No, in the trunk that came to his wife?

A. I never did see what was in there. All I seen was the things he mailed back from the Islands, a couple of dirty shirts and some things.

Q. Whom were those mailed to?

(Testimony of Perry Lynn Downing, Sr.)

A. Those went to her. The Government sent those back to her. [54] He didn't mail them, no, because that was after he was killed.

Q. You don't know what was contained in the trunk that came to Mrs. Dorothy Downing?

A. No, I didn't even know she had got one.

Mr. Denecke: That is all, your Honor.

Mr. Hamilton: No questions.

(Witness excused.) [55]

IRENE MUELLER

was thereupon produced as a witness on behalf of the defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Yunker:

Q. Your name is Irene Mueller?

A. That is right.

Q. What relationship do you bear to Lieutenant Perry Lynn Downing? A. I am his sister.

Q. Do you know his wife? A. Yes.

Q. Did you have occasion to see your brother when he was here on his last furlough?

A. Quite often.

Q. When was that, do you remember?

A. It was in April. He got in the day President Roosevelt died.

Q. April, 1945? A. Yes.

Q. How did he and his wife get along in your presence?

(Testimony of Irene Mueller.)

A. Well, at that time they got along fair. They would run around together. I didn't suspect a thing at that time.

Q. I will ask you whether or not you received certain letters from your brother? [56]

A. Yes.

Q. I will ask the Clerk to hand you Exhibit No. 18.

The Court: Aren't they all going in evidence?

Mr. Yunker: I just want her to explain a certain thing.

Q. In looking at that letter, Mrs. Mueller, it makes reference in there, does it not, to where he asks you to see George's brother-in-law for some legal advice. Is that right? A. Yes.

Q. Who is "George"?

A. George is my husband.

Q. And the brother-in-law?

A. The brother-in-law is the attorney, you.

Q. In that letter he also asks you to see the brother-in-law and get some "poop." What does that mean in flight language?

A. He wanted some advice. It was just some expression—He wanted some legal advice from my brother-in-law that was an attorney.

Mr. Yunker: You may examine.

The Court: Are you related to this lady that is on the stand?

Mr. Yunker: No. It all depends.

The Court: Who is the lawyer referred to?

(Testimony of Irene Mueller.)

Mr. Yunker: That is myself. It is not any relationship, however.

Mr. Denecke: No questions, your Honor. [57]

Cross Examination

By Mr. Hamilton:

Q. You received that letter when? Do you recall? It was in 1945?

A. Yes, it was. It was just after V-J Day.

Q. After he had gone overseas? A. Yes.

Q. How did you interpret that language in the letter? What does that mean?

A. Well, from things he had talked to me about when he was home on his last furlough, he wanted to know about a separation.

Q. Things he talked to you about?

A. Well, there was some things come up and he said that she was acting that way—

Q. I think you testified a minute ago that when he was home on his furlough in April, 1945, they got along well together.

A. They got along fairly well. He went his way and she went hers. I would say, "Where is your wife?" And he would say, "She is at home. She would rather be with her mother."

Q. I want to get this straight. It seems to me these two statements are somewhat inconsistent. You first said you thought they got along fairly well together and your last statement indicates that they did not.

A. He didn't come out and state there was any trouble between them. [58]

(Testimony of Irene Mueller.)

Q. What did he say?

A. Well, I would come to his house, and I would say, "Where is Dot?" "Oh, she is home," or "She went down with her mother." I had dinner for everyone and Dorothy could not make it. I don't know why.

Q. He did not discuss it with you, is that it?

A. No, he did not discuss it. He just said, "She wants to be with her mother."

Q. As a result of that letter did you consult with Mr. Yunker? A. No, I didn't.

Q. Did you consult any lawyer? A. No.

Mr. Hamilton: That is all.

Cross Examination

By Mr. Denecke:

Q. You knew Mrs. Downing was expecting a child in about a month, did you not?

A. Yes. We all got along fine. While he was home on his last furlough, I even had a shower for her. I had no hard feelings with any of the family.

(Witness excused.) [59]

GERTRUDE I. DOWNING,

one of the defendants herein, was thereupon produced as a witness in her own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Yunker:

Q. You are the mother of Lieutenant Downing?

A. I am.

Q. Mrs. Downing, you filed or signed an affidavit, did you not, with the Veterans Bureau? Do you remember that? A. Yes, sir.

(Testimony of Gertrude I. Downing.)

Q. I hand you Exhibit No. 2 and ask you if you ever saw that before? A. Yes, sir.

Q. Did you sign and execute that document?

A. Well, there are some things in it that are not worded the way I signed it.

Q. Would you explain why it was you first signed that, what you were trying to effect?

A. Well, I just wanted to do what was right, what I thought was right.

Q. You have never cared for the money yourself?

A. I have no desire for any part of that money.

Q. Did you go to the Veterans Bureau in an attempt to get it straightened out so that your daughter-in-law could get the money? [60]

A. I did.

Q. And you signed that affidavit? A. Yes.

Q. I will ask you whether that part of the affidavit is true which states that your son told you in California that all the papers had been made up transferring everything to the plaintiff in this case?

A. There was nothing like that said. I just asked him if he had his personal affairs in order and he said he did have everything in order.

Q. Did you read the affidavit before you signed it? A. Well, maybe I didn't. I don't know.

Q. You were attempting to get the money for your daughter-in-law?

A. I really tried, Mr. Yunker.

Q. What is your purpose now in contesting this case?

(Testimony of Gertrude I. Downing.)

A. I want to save it now for Linda and Linda alone.

Q. I don't think your husband knew exactly how the bank account is. Just explain that.

A. The bank account is made out in the names of Gertrude I. Downing and Perry Lynn Downing, Trustees for Linda Lee Downing.

Q. You have made wills and so on protecting that fund? A. Yes.

Q. Is that your sole purpose? A. Yes.

Q. Did you know, prior to the letters you received from your son, that he was not getting along with his wife?

A. No. I felt a little bit hurt at him when we reached Chico and he came to me before he came to his wife. I felt hurt about it. I asked him then why he did not greet his wife first.

Q. Did he tell you?

A. He said he would take care of that afterwards.

Mr. Yunker: You may examine.

Cross Examination

By Mr. Denecke:

Q. With reference to this affidavit, Exhibit No. 2, you made the statement that it was not signed—not worded the way you signed it. Do you think it has been changed since you signed it?

A. I don't recall telling them that he had made out the insurance policy and had everything signed to Dorothy. I don't recall making that statement,

(Testimony of Gertrude I. Downing.)

and there is language here I think which refers to insurance and everything. I don't recall making that statement that he had changed his insurance and all to Dorothy.

Q. That statement was drawn up in the presence of Charles R. Harvey, an attorney, was it not?

A. Yes.

Q. Did Mr. Harvey have the statement typed or did you tell him [62] the story of what you think had happened?

A. Yes.

Q. And then he had it typed?

A. Yes, that is right.

Q. Didn't you and Mrs. Dorothy Downing both read that over after it was typed?

A. I don't think we did. I was just trying to get it for Dorothy at the time and I don't think I read it.

Q. You don't think you read it before you signed it?

A. I do not.

Q. You don't think you told Mr. Harvey the document correctly recited your recollection?

A. I couldn't remember.

Q. Is there anything else in the document, Mrs. Downing, other than the part about "that his personal affairs were in order and that he had executed the necessary documents leaving everything to his wife—" Is there anything there, now that you have looked at it, that is not correct?

A. He never said that he had executed all those legal documents leaving everything to his wife. He

(Testimony of Gertrude J. Downing.)

didn't say that to me and I didn't say that to anybody.

Q. You did not tell that to Attorney Harvey?

A. No.

Q. The best of your recollection is that you did not read this over? [63] A. I did not.

The Court: Did she understand all the time she was the beneficiary? You have not asked her that.

Mr. Yunker: No. I assumed that was a matter—I shall do that.

The Court: No. That is not the question, did she understand that she was not; whether she understood that she was.

Mr. Yunker: I will ask her that.

The Court: Ask her now.

Mr. Yunker: Q. Did you ever understand, or, first of all, were you told that you were the beneficiary of this policy?

A. I got a letter from the Government asking me to file for it and then—

Q. I don't mean after his death. I mean prior to his death, when the insurance was first taken out. You received, did you not, from the War Department, some forms showing you as beneficiary?

A. Yes.

Q. And showing that your husband was a contingent beneficiary? A. Yes.

The Court: Did she and her son discuss it?

A. He never discussed anything with me.

Mr. Yunker: Q. Did he discuss it with you at all? A. He did not.

(Testimony of Gertrude I. Downing.)

Q. Did he ever tell you he had changed it? [64]

A. No, sir, he did not.

Q. As far as you know, did you continue as beneficiary?

A. As far as I know, I presumed he changed it to his wife.

Q. You just presumed that?

A. I presumed.

Q. Did he tell you anything about it?

A. No, he did not.

Q. You just presumed, because of his marriage, that he did that? A. Yes.

Mr. Denecke: Q. When you made this affidavit out, where did you make it out? Was it in Mr. Harvey's office?

A. Somebody's office over in the—

Q. Lumbermen's Building?

A. Down on Stark and Third.

Q. Is was in this attorney's office, and he notarized the statement? A. Yes.

Q. Did he know anything about the situation before you and Mrs. Dorothy Downing came to him?

A. I don't know if he did or not. I think it was her attorney. I am not sure. I just went up there with her to help her to try get it.

Q. Did Mr. Harvey ask you questions concerning the things or information that he put on here?

A. He didn't ask me—I wouldn't remember. I suppose he did.

Q. Pardon?

A. I suppose he did, yes, but I don't remember.

(Testimony of Gertrude I. Downing.)

Q. To the best of your recollection, he got this information from you that was put down here, is that correct? A. He must have.

Q. Well, I mean there wasn't anyone else there besides you and Dorothy Downing?

A. No, I don't think so.

Q. You state here in this affidavit, "I believe that my son changed the beneficiary, named his said wife."

A. That was just my personal belief. I didn't know. He never talked to me about it.

Q. That was your personal belief?

The Court: She testified, while you were busy over there, that he never discussed it with her.

Mr. Denecke: I beg your pardon.

The Court: And she said she presumed that when he got married he changed it.

Mr. Denecke: Q. Do you recall this conversation when driving between Chico and Salinas, this conversation with your son concerning his personal affairs?

A. I don't recall whether we were driving or not, but I know it was between Chico and Salinas some place that I asked him if [66] he had all his affairs in order.

Q. What did he say at that time?

A. He said, "I have got everything in order."

Q. And it is your recollection now he did not say that he had made everything over to his wife?

A. He never made that statement to me at any time.

(Testimony of Gertrude I. Downing.)

Mr. Denecke: That is all.

Cross Examination

By Mr. Hamilton:

Q. Do I understand you to say at this time you do not recall the statement here to the effect, "I talked to my son, Perry L. Downing, Jr., immediately prior to the time he was assigned to duty overseas and asked him if he had arranged his personal affairs, that at said time he told me that his personal affairs were in order and that he had executed the necessary documents leaving everything to his wife"? Do I understand you to say you do not recall that that statement was in this affidavit when you signed it?

A. I do not, not all of that part of it. The last part about having executed the legal documents and leaving everything to his wife, I didn't see.

Q. What was the purpose of making this affidavit?

A. Well, at the time we wanted to change the insurance over and leave it to the daughter-in-law and let her have it and I, being the beneficiary, didn't want any part of it. [67]

Q. The statement in here about the execution of this document would be a statement you would expect to find in that affidavit, since that is what you were trying to do?

A. Yes, but I wouldn't say something I didn't hear and he never at any time said he had left everything to his wife.

Mr. Hamilton: That is all.

(Witness excused.)

Mr. Yunker: That is the defendants' case.

Mr. Denecke: I would like to call Attorney Harvey as a rebuttal witness.

The Court: Give me those authorities. You said there were a couple of decisions. Is Mr. Harvey here?

Mr. Denecke: No, your Honor. I did not anticipate we would finish so soon.

The Court: I am going to hear you in argument anyhow. We will take ten minutes recess.

(Recess.)

Mr. Yunker: We have no objection to any of their exhibits, your Honor.

Mr. Denecke: And we have no objections, your Honor.

The Court: All the pre-trial exhibits are admitted as trial exhibits and will bear the same numbers as the pre-trial exhibits.

(Thereupon the following pre-trial exhibits were thereupon received in evidence and marked as follows:)

PLAINTIFF'S EXHIBIT No. 1

Photostatic copy AAF Officers Qualification Record in re Perry Lynn Downing, Jr.

PLAINTIFF'S EXHIBIT No. 2

Affidavit signed by Gertrude Downing, dated October 21, 1946.

PLAINTIFF'S EXHIBIT No. 3

Photostatic copy of record at time of reporting for active duty, Perry L. Downing, Jr.

PLAINTIFF'S EXHIBIT No. 4

Personal Affairs Statement, Perry Lynn Downing, April 10, 1945.

PLAINTIFF'S EXHIBIT No. 5

Personal Affairs Statement, Perry Lynn Downing, December 28, 1944.

PLAINTIFF'S EXHIBIT No. 6

Application for National Service Life Insurance, Perry L. Downing, Jr., dated April 18, 1943.

PLAINTIFF'S EXHIBIT No. 7

Application for National Service Life Insurance, Perry Lynn Downing, Jr., July 2, 1943.

PLAINTIFF'S EXHIBIT No. 8

Application for National Service Life Insurance, Perry Lynn Downing, Jr., July 22, 1943.

DEFENDANTS' EXHIBIT No. 9

Letter postmarked August 15, 1945, to Mr. and Mrs. Lynn Downing, Sr., from Lt. Perry L. Downing, Jr.

DEFENDANTS' EXHIBIT No. 10

Letter postmarked August 22, 1945, to Mr. and Mrs. [69] Lynn Downing, Sr., from Lt. Perry L. Downing, Jr.

DEFENDANTS' EXHIBIT No. 11

Letter dated September 12, 1945, addressed to Mr. and Mrs. Lynn Downing, Sr., from Lt. P. L. Downing, Jr.

DEFENDANTS' EXHIBIT No. 12

Letter dated September 13, 1945, to Mr. and Mrs.

Lynn Downing, Sr., from Lt. Perry Lynn Downing, Jr.

DEFENDANTS' EXHIBIT No. 13

Letter dated September 23, 1945, to Mr. and Mrs. Lynn Downing, Sr., from Lt. Lynn Downing, Jr.

DEFENDANTS' EXHIBIT No. 14

Certification in re National Service Life Insurance, Perry L. Downing, Jr., addressed to Mr. Perry Lynn Downing, 7023 Northeast 7th Avenue, Portland, Oregon, dated August 7, 1943.

DEFENDANTS' EXHIBIT No. 15

Certification in re National Service Life Insurance, Perry L. Downing, Jr., addressed to Mr. Perry Lynn Downing, 7023 Northeast 7th Avenue, Portland, Oregon, dated September 30, 1943.

DEFENDANTS' EXHIBIT No. 16

Certification in re National Service Life Insurance, Perry L. Downing, Jr., addressed to Mrs. Lynn Downing, 7023 Northeast 7th Avenue, Portland, Oregon, January 28, 1944.

DEFENDANTS' EXHIBIT No. 17

Report of Veterans Administration, Docket No. M-15,798 [70] in re Perry L. Downing, Jr., XC-04,012,520.

DEFENDANTS' EXHIBIT No. 18

Letter undated, signed "Lynn," addressed "Dear Sis and All."

PLAINTIFF'S EXHIBIT No. 19

Personal Affairs Statement, Glenn Christian Bauman, dated May 31, 1945.

PLAINTIFF'S EXHIBIT No. 20

Letter, Headquarters Chico Army Air Field, dated April 11, 1945, addressed to "Mrs. Downing."

PLAINTIFF'S EXHIBIT No. 21

Letter, Headquarters Chico Army Air Field, dated January 24, 1945, addressed to Mrs. Dorothy A. Downing.

PLAINTIFF'S EXHIBIT No. 22

Letter, undated, signed "Lynn," addressed "Dearest Dot and Linda."

PLAINTIFF'S EXHIBITS Nos. 23 to 29, incl.

Letters from Lieutenant Lynn Downing, Jr., addressed to Mrs. Lynn Downing, Jr.

(Recess.) [71]

1:15 p.m.

The Court: Mr. Foster, it is stipulated by counsel at the counsel table that in the absence of Mr. Holcomb, the regular Reporter, that you may take and transcribe this testimony to the same legal effect as if otherwise taken and transcribed by Mr. Holcomb in person. Call your witness.

Mr. Denecke: Charles R. Harvey.

CHARLES R. HARVEY

was thereupon produced as a witness in behalf of

(Testimony of Charles R. Harvey.)

plaintiff, in rebuttal, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Denecke:

Q. Mr. Harvey, I hand you a document, Exhibit 2, an affidavit, and ask you if that is your signature at the bottom of the document.

A. That is right, that is my signature.

Q. Will you tell the Court the circumstances surrounding the taking of that document.

A. It's been some time ago. As I recall it, Gertrude Downing had been referred to me by one of the Veterans Aid Agencies—I believe it was the American Legion—in connection with a claim that she was making against the Veterans' Administration for payment of her deceased husband's insurance to her. I—— [72]

Q. Excuse me. Was it Mrs. Gertrude Downing or Mrs. Dorothy Downing?

A. It was the daughter-in-law. I think it was Dorothy Downing.

Q. Mrs. Downing is sitting here at the table?

A. That is right.

Q. All right; you may go ahead.

A. I requested, as I recall it, I requested her to have her mother-in-law call at my office, and I believe it was some time later that she came to my office with Dorothy Downing—That is, Gertrude Downing came to my office with Dorothy Downing—and after discussing the matter with them I pre-

(Testimony of Charles R. Harvey.)

pared this affidavit, and it was executed by Gertrude Downing as a sworn statement as to the facts that are related in it. I haven't read the whole affidavit yet.

Q. Now, do you recall—You say you haven't read it? A. No, I haven't.

Q. Do you recall, independent of that document, whether Mrs. Gertrude Downing told you that her son, Perry Lynn Downing, Jr., had told her that he had turned everything over to his wife and that she was to be the beneficiary of his insurance policy?

A. I don't recall the exact words, but I recall the conversation and that was the substance of it.

Q. Now, do you recall specifically—Or what is your best recollection as to her remarks about this subject? Can you [73] give those?

A. Well, I don't have any independent recollection of the words that she said, but I do have an independent recollection of the questions that were discussed, and it is my recollection that she stated that in letters that she had received from her son—I believe it was while he was stationed in California—that he had indicated that he had turned everything over to his wife, and, of course, the remaining question at that time was the insurance policy and that was mentioned specifically.

Q. Now, did you see Mrs. Gertrude Downing read that document before she signed it?

A. I always require that the affiant read an affi-

(Testimony of Charles R. Harvey.)

davit before I attach my signature and seal to it. I have no independent recollection of her reading it, but I always do require that. I never dispense with that.

Mr. Denecke: Thank you. That is all, your Honor.

Cross-Examination

By Mr. Yunker:

Q. Mr. Harvey, is it your best recollection that Mrs. Downing told you that this information was contained in letters, is that right?

A. Yes—not necessarily the specific information that on a certain date he had done a certain thing, but that that was the tenor of the contents of the letters generally.

Q. Will you look at the affidavit, and you will notice that it [74] says the information was obtained in a conversation.

A. Just a minute until I have a chance to read it. I have no independent recollection of it, but, as I say, I haven't read the affidavit before I came here, and that was last October.

Q. As a matter of fact, Mr. Harvey, the main thing you were trying to do was to effectuate some purpose that they came in to ask you to effectuate, isn't that right?

A. Yes. Gertrude Downing and Dorothy Downing were more or less cooperating in this effort.

Q. And, as far as you were concerned, you wrote

(Testimony of Charles R. Harvey.)

it down with that purpose in mind, to get that result, isn't that right?

A. That is right; at her direction I did.

Q. And, as a matter of fact, it could have been that Mrs. Downing told you part of the facts and—That is, the mother-in-law told you part of the facts—and the daughter told you facts?

A. No, I believe that the daughter-in-law had told me the facts in a previous visit to my office, and my conversation at this time was with the mother-in-law almost entirely.

Q. And your affidavit had already been prepared?

A. No, I think I typed it as they sat there. I think I did this typing myself. I am not sure of that, but that is—I believe that is the way it happened.

Mr. Yunker: That is all. [75]

Mr. Denecke: That is all, your Honor.

The Court: All right. The case is submitted. I will decide it very soon. I am ready to read the exhibits. Court is adjourned until 10:00 o'clock tomorrow morning.

(Whereupon Court was adjourned to 10:00 o'clock a.m. Wednesday, April 21, 1948.) [76]

REPORTERS' CERTIFICATE

We, Ira G. Holcomb and Glenn G. Foster, do hereby certify that on the 20th day of April, A. D. 1948, we reported in shorthand certain proceedings

had on the trial of the above-entitled cause, and that we subsequently caused our said shorthand notes to be reduced to typewriting, and that the foregoing transcript, pages numbered 1 to 76, both inclusive, constitutes a full, true and accurate transcript of said proceedings, the portion reported and transcribed by each of us being as follows: Ira G. Holcomb, pages 1 to 71, incl.; Glenn G. Foster, pages 72 to 76, incl., so taken by each of us in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 17th day of July, A. D. 1948.

/s/ IRA G. HOLCOMB,

/s/ GLENN D. FOSTER.

[Endorsed]: Filed July 19, 1948.

[Endorsed]: No. 12000. United States Court of Appeals for the Ninth Circuit. Gertrude I. Downing and Perry Lynn Downing, Sr., Appellants, vs. Dorothy A. Downing and United States of America, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed July 29, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12000

GERTRUDE I. DOWNING and PERRY LYNN
DOWNING, SR.,

Appellants,

vs.

UNITED STATES OF AMERICA and DOR-
OTHY A. DOWNING,

Appellees.

STATEMENT OF FACTS

Comes now Gertrude I. Downing and Perry Lynn Downing, appellants herein and specify the following as the points upon which they intend to rely upon appeal:

I.

That Gertrude I. Downing and Perry Lynn Downing, Sr., were and are beneficiaries of a National Service life insurance policy on the life of their son, Perry Lynn Downing, Jr.

II.

That no change of beneficiary had been made by the said Perry Lynn Downing, Jr., to the appellee, Dorothy A. Downing, or to any one else.

III.

That there is no evidence of any valid change of the said beneficiaries.

/s/ FRANCIS F. YUNKER,
Attorney for Appellants.

Due and legal service of the within designation by receipt of a duly certified copy thereof, as required by law is hereby accepted in Multnomah County, Oregon, on this day of August, 1948.

/s/ ARNO H. DENECKE,
Attorney for
Dorothy A. Downing,

/s/ FLOYD D. HAMILTON,
Attorney for
United States of America.

[Endorsed]: Filed Aug. 13, 1948. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the respective parties hereto, acting by and through their respective attorneys, that the following designation of parts of the record of the above entitled cause are the parts of the record necessary for the consideration of the above entitled court:

1. Complaint.

2. Answer of the defendants Gertrude I. Downing and Perry Lynn Downing, Sr.

3. Answer of defendant United States of America.

4. Findings, conclusions and judgment.

5. Notice of appeal.

6. Transcript of evidence and proceedings of the trial.

It Is Further Stipulated that the exhibits introduced in evidence at the trial of the above entitled cause may be considered by the court in their original form, as though set out in the printed record.

/s/ FRANCIS F. YUNKER,
Attorney for Gertrude I. Downing and Perry Lynn
Downing, Sr.,

/s/ ARNO H. DENECKE,
Attorney for
Dorothy A. Downing,

/s/ FLOYD D. HAMILTON,
Attorney for
United States of America,

[Endorsed]: Filed Aug. 13, 1948. Paul P.
O'Brien, Clerk.



In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

GERTRUDE I. DOWNING and PERRY
LYNN DOWNING, SR.,

Appellants,

vs.

DOROTHY A. DOWNING and UNITED
STATES OF AMERICA,

Appellees.

APPELLANTS' BRIEF

FILED

OCT 2 - 1948

PAUL P. O'BRIEN,

CLERK

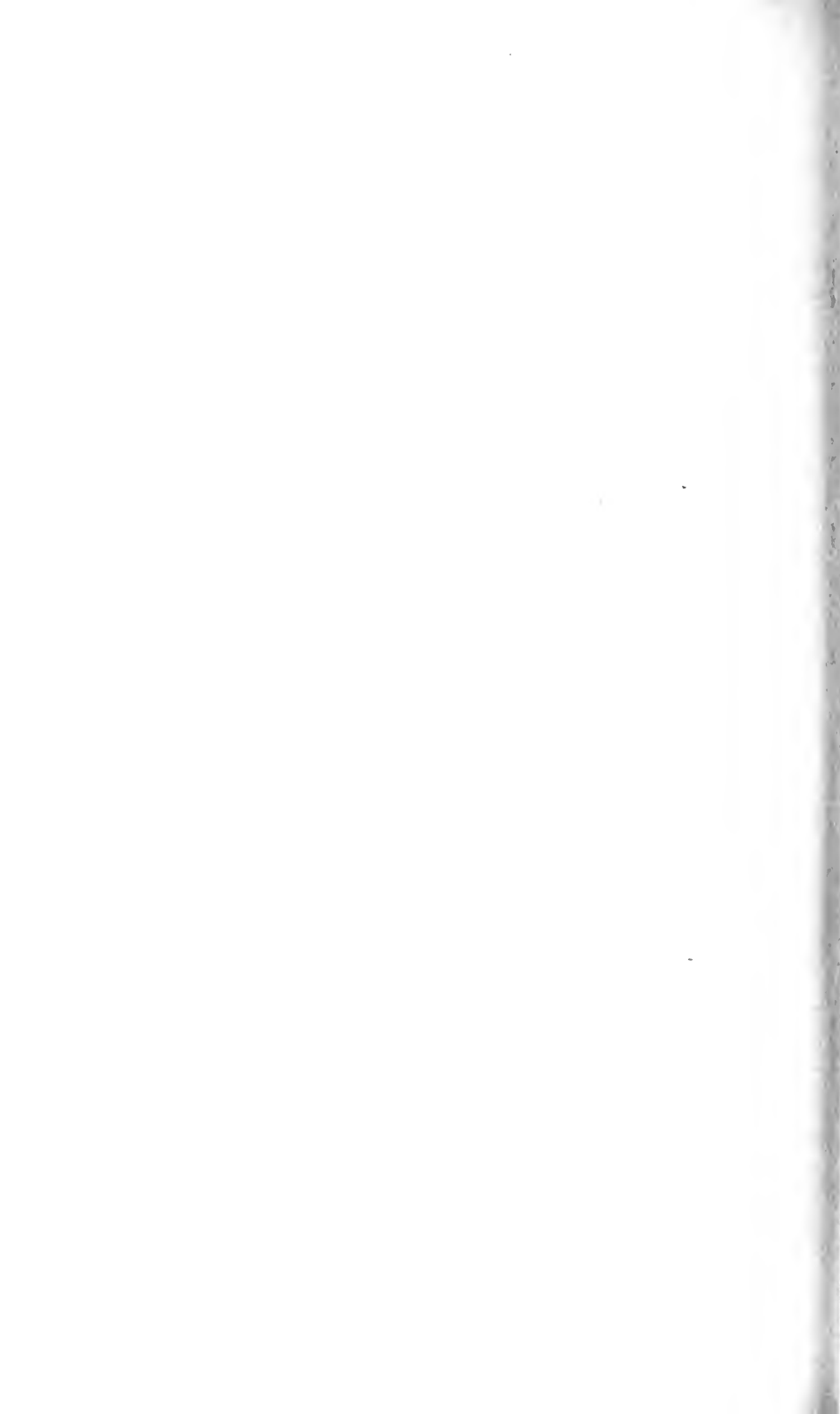
FRANCIS F. YUNKER,
Portland 5, Oregon,
Attorney for Appellants.

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In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

GERTRUDE I. DOWNING and PERRY
LYNN DOWNING, SR.,

Appellants,

vs.

DOROTHY A. DOWNING and UNITED
STATES OF AMERICA,

Appellees.

APPELLANTS' BRIEF

**STATEMENT OF PLEADINGS AND FACTS
DISCLOSING BASIS OF JURISDICTION IN
THE DISTRICT COURT AND JURISDICTION
OF CIRCUIT COURT OF APPEALS
TO REVIEW THE JUDGMENT**

This is a cause on appeal from the District Court of the United States for the District of Oregon. It is a cause in the nature of a suit for declaratory judgment to determine the beneficiary of a policy of National Service Life Insurance upon the life of Lieutenant Perry Lynn

Downing, Jr., a member of the Air Corps of the United States Army, who was killed on October 3, 1945.

The District Court had exclusive jurisdiction to determine the issue by virtue of Act of June 7, 1924, c. 320, Sec. 19, 43 Stat. 612, 38 U.S.C.A., S. 445, as amended by Sec. 617 of the National Service Life Insurance Act of 1940, 54 Stat. 1014, Act of July 11, 1942, c. 504, Sec. 6, 56 Stat. 659, 38 U.S.C.A., S. 817. This Court has jurisdiction to review that judgment by virtue of 28 U.S.C.A. Sec. 225.

The pleadings showing the existence of jurisdiction are the Complaint, Tr. 2 to 5; Answer of the United States of America, Tr. 8 to 11; and Answer of the defendants Gertrude I. Downing and Perry Lynn Downing, Tr. 5 to 8.

STATEMENT OF THE CASE

Lieutenant Downing became a member of the Armed Service on or about December 9, 1942 (Tr. 13). Thereafter and on April 18, 1943 (Exhibit 6), he applied for and received a \$10,000 National Service life insurance certificate. At that time Lieutenant Downing was unmarried and named his mother, Gertrude I. Downing, as beneficiary, and his father, Perry Lynn Downing, Sr., as contingent beneficiary (appellants). Thereafter and on the 4th day of September, 1943, the Lieutenant married Dorothy Downing, one of the appellees. A child was thereafter born on the 20th day of June, 1945 (Tr. 22). On December 28, 1944, Lieutenant Downing executed

a document (Exhibit 4) referred to as a Personal Affairs Statement. It appears that the periodic execution of a Personal Affairs Statement is a requirement of all flying officers. This statement purports to be a confidential statement showing the consolidation of all personal affairs actions claimed to have been taken by the soldier. It contains the information that the soldier had obtained a \$10,000 war risk policy, and that the beneficiary thereof was the appellee, his wife, Dorothy A. Downing.

Based on the said Exhibit 4 and purported statements made by the deceased Lieutenant, the appellee claims that a change of beneficiary was accomplished. The Veterans Administration denied the appellee's claim of change of beneficiary, and an appeal was taken to the Board of Veterans Appeals, and her claim was again denied, Exhibit 17.

Thereafter, this suit was commenced, seeking adjudication that a change of beneficiary had been made in her favor, the court sustained the complaint and the appellants now appeal. The question, therefore, is whether or not a valid change of beneficiary has been made in the soldier's life insurance policy. The issue is joined by the allegations in the complaint of a valid change and a denial thereof by the United States of America and the appellants.

SPECIFICATIONS OF ERROR

The appellants allege error committed by the lower court as follows:

1. The Court erred in holding that Exhibit 4 (Personal Affairs Statement) and statements made by the deceased constituted a change of beneficiary.

2. The court erred in finding that after the marriage of Perry Lynn Downing, Jr., he executed a change of beneficiary of his National Service life insurance and designated Dorothy Downing, the appellee, as the principal beneficiary, and that the document was inadvertently lost while it was in the possession of the United States Army.

SUMMARY OF ARGUMENT

The appellants' contentions are that the beneficiary of the National Service Life Insurance Policy of Lieutenant Perry Lynn Downing, Jr., has never been changed from his mother and father to Dorothy Downing, the appellee. We maintain that neither the execution of the personal affairs statement nor alleged statements made by the decedent as to his change of beneficiary are sufficient to constitute a valid change of beneficiary.

FIRST SPECIFICATION OF ERROR

The Court erred in holding that Exhibit 4 (Personal Affairs Statement) and statements made by the deceased constituted a change of beneficiary.

ARGUMENT

It is admitted by the respondent that the original beneficiary of the deceased's life insurance policy were the appellants, his mother and father (Tr. 3). They contend that this beneficiary was changed by the decedent having executed a personal affairs statement stating that he had a National Service Life Insurance policy with his wife, the appellee, as beneficiary. This exact situation arose in the case of *Bradley vs. United States*, 10 Cir., 143 F. 2d 573, Certiorari denied, 323 U.S. 793, 65 S. Ct. 429, 89 L Ed. 632, wherein the soldier named his mother as beneficiary, thereafter married and thereafter filled out a personal affairs statement showing his wife as beneficiary. The court, holding in that case that there was no change of beneficiary, said:

"The expressed intention of the insured to change the beneficiary, standing alone and unaccompanied by some affirmative act, having for its purpose the effectuation of his intention, is insufficient to effect a change of beneficiary and the courts cannot act when he has not first attempted to act for himself. . . . There is nothing in the confidential report or the evidence of this case from which it can be legitimately inferred that it was intended for the use and information of the Veterans Administration, or that its purpose was to effect a change of beneficiary under the life insurance policy. . . . It is not a notice of any kind, is not a direction that the name of the beneficiary be changed, and does not express or indicate even directly or inaptly a desire to have the beneficiary changed. Indeed, it is not a voluntary expression of any wish, desire or intention. . . . When given its most liberal construction in the light of all the facts and circumstances, we are convinced that

it cannot be treated as an effectuation of the insured's intention to change his beneficiary."

There are other cases in the Circuit Court of Appeals which hold that changes of beneficiary had been made without the necessity of literally complying with the provisions and regulations of the Veterans Administration. *Shapiro vs. United States*, 166 F. 2d No. 2 P. 240; *Collins vs. United States*, 10 Cir. 161 F. 2d 64, Certiorari denied, 331 U.S. 859, 67 S. Ct. 1756; *Roberts vs. United States*, 4 Cir. 157 F 2d 906, Certiorari denied, 330 U.S. 829. However, in each of these cases a substantial compliance with the regulations were found.

We maintain, and it has never been contradicted, that National Service Life Insurance policies stand upon the same legal basis as any other life insurance policy, and, therefore, the rules and regulations as to a change of beneficiary must be followed in order to constitute a valid change. The Act of Congress in creating National Service Life Insurance granted to the Veterans Administration the right to promulgate rules and regulations for the administration of the said act. Thereafter, the Veterans Administration formulated the following requirement for change of beneficiary:

"The change of beneficiary to be effective must be made by notice in writing signed by the assured and forwarded to the Veterans Administration by the insured or his agent and must contain sufficient information to identify the assured wherever practical. Such notice shall be given on blanks prescribed by the Veterans Administration. Upon receipt by the Veterans Administration a valid designation or

change of beneficiary shall be deemed to be effective as of the date of execution." (Regulations of the Veterans Administration, 7 Fed. Reg. 8363 S. 10.-3447, Oct. 16, 1942.)

With reference to the foregoing regulation, the Court in the Bradley case said:

"The manifest purpose of the foregoing regulation is to create a legal standard for the orderly administration of the Act by providing a means and method for the exercise of the statutory right of the insured to change the beneficiary of his insurance and to protect the insurer against conflicting claims for the proceeds of the policy."

There is no contention made by the appellee that there was any affirmative act by this deceased which would fulfill the requirements of the aforementioned regulation. Their only claim seems to be that his act in executing the personal affairs statement would have that effect. However, that statement contains the following instructions:

"Instructions: AAF Personal Affairs Statement is not to be used, either as a substitute for, or in lieu of authorized forms or established procedures for effecting desired personal affairs actions. The purpose of this form is to provide a consolidated record of all personal affairs actions taken by previous accomplishment of official forms. Accordingly, prior to signing this statement, any action will be accomplished in the prescribed official manner."

There was nothing in this statement of affairs which could be said to effect a change of beneficiary nor could it be said that the deceased was misled by the form used as was the case in *Shapiro vs. United States*, 166 F. 2d

No. 2 P. 240, wherein the soldier executed a document entitled "Designation of Beneficiary." It appears in that case that the soldier understood that this "Designation of Beneficiary" had reference to his insurance policy, whereas in truth the form was intended for a designation of beneficiary for his gratuity pay. The court expressly held in that case that the soldier, Shapiro, as well as his Commanding Officer understood that this form was the proper one for use with his life insurance policy.

The courts are unanimous in holding that in order to effectuate a change of beneficiary there must be (1) an intent; (2) an affirmative act to change the beneficiary. The appellants have introduced evidence (Exhibits 9 to 13) showing that the soldier was having marital difficulties and had had such difficulties practically ever since the marriage. The exhibits (18) show that the soldier was planning on a divorce and had already made plans to have his father take the family automobile from the possession of the appellee. His further act in sending most of his personal effects to his parents rather than his wife show that it was not his intention to remain with his wife. This intention is also borne out by his statements that he wanted to remain in the Armed Services. How then can the appellee claim there was any intention to change the beneficiary?

The appellee has attempted to bolster her claim of change of beneficiary by certain alleged statements made by the deceased to a brother officer to the effect that he had made such a change. She has produced Glen Bauman who claims to have been at Chico, California, with

the deceased in April of 1945, and that the deceased had made statements to him that he was going to change the beneficiary. Mr. Bauman says:

"A. Well, it happened right after our leave up here in April of 1945. We had gone back—We had flew back from here—and we were prepared to go overseas; we were alerted at the time, and he had told me that he was going to change his beneficiary—change his insurance. I had known at the time that his mother was beneficiary before that, and both of us went in at the same time to change.

* * * * *

A. We went in and, as far as I know, he filled it out. I didn't pry into his affairs. I didn't think it was any of my business, but he had told me after we came out that he had everything straightened out as far as his insurance was concerned. I didn't ask him whether it was to his wife or whether it was to his mother, but I took it it was for his mother—I mean, for his wife, rather.

Q. At that time did you fill out a Personal Affairs Statement?

A. Yes, sir, I did.

Q. You went to Headquarters. Was that the place that soldiers would go to make a change of insurance beneficiary?

A. That is the only place.

Q. Did he indicate to you beforehand to whom he was going to change his insurance?

A. No, he didn't say exactly, but he said he was going to change his beneficiary.

Q. Did he say afterwards, when he came out of Headquarters—What is your best recollection of what he did say?

A. Well, he said he had taken care of it. I pre-

sumed he had changed it because that is what he told me he went in—That is what he told me before we went in.

Q. Did he say anything further?

A. Not exactly that I remember of. That is about all that (36) was said." (Tr. Pp. 47 to 49).

If these alleged statements by the deceased are true, having been made in April or May, 1945, it necessarily follows that the deceased's act in executing the Personal Affairs Statement of December 28, 1944, was never intended to be a change of beneficiary. The testimony of Bauman was only admissible for the purpose of either (1) showing the state of mind of the decedent, or (2) resolving an ambiguity of a written statement. (*Shapiro vs. United States* supra). Herein there was no ambiguity of any instrument nor was there any showing of the deceased's state of mind inasmuch as the alleged statements of the deceased did not show to whom he intended to make his beneficiary. It must be kept in mind that there was no waiver of the strict provisions of the regulations of the Veterans Administration of the United States as was the case in *Collins vs. United States*, supra. The Veterans Administration in all of its rulings and the United States of America in its answer herein all deny that there has been any valid change and all maintain that the beneficiaries are the appellants herein.

SECOND SPECIFICATION OF ERROR

The court erred in finding that after the marriage of Perry Lynn Downing, Jr., he executed a change of bene-

ficiary of his National Service Life Insurance and designated Dorothy Downing, the appellee, as the principal beneficiary, and that the document was inadvertently lost while it was in the possession of the United States Army.

ARGUMENT

The above quoted finding of the District Court appears in the findings of the said court (Tr. 14). The only basis we can see for such a finding is an inference based upon the execution of the personal affairs statement, but as stated heretofore under the First Specification of Error, the courts have already held that the execution of a personal affairs statement is not sufficient to constitute such a change.

As heretofore stated, the testimony of Glen Bauman in our opinion adds nothing to the evidence in this case but hearsay and was inadmissible for the purpose of proving a change of beneficiary. The case of *Collins vs. United States*, supra, affirms the *Bradley* case, supra, the court stating in the *Collins* case as follows:

"It has been held without exception that a mere intent to change a beneficiary is not enough. Such an intent must be followed by positive action on the part of the assured evidencing the right to change the beneficiary. . . . In the *Bradley* case the insured soldier had taken no affirmative steps to bring about a change in beneficiary. He had written no letter requesting such a change, filed no application, nor had he done anything else. The only act relied upon to establish a change in beneficiary was a statement contained in a confidential report which was re-

quired of all flying officers, and the only purpose of which was to compile and maintain accurate personal records of all of the officers of the Air Corps. This report was addressed to the United States Army Air Corps. In the report the officer was asked the amount of government insurance and the beneficiary thereof. When he filled out this confidential report, he answered that he had \$10,000 government insurance, and that Ann M. Bradley, his wife, was the beneficiary. As pointed out in the opinion, at most this statement did not even constitute an expression of a desire to have the beneficiary changed. At most it indicated a belief or understanding that his wife was the present beneficiary. The difference between those facts and the facts in this case are obvious upon a casual examination."

The appellee appears to take much comfort from the affidavit of Gertrude Downing, one of the appellants (Exhibit 2), dated October 21, 1946, wherein she states:

"... That on or about the 25th day of July, 1945, I talked to my son Perry L. Downing, Jr., immediately prior to the time he was assigned to duty overseas, and asked him if he had arranged his personal affairs, that at said time he told he that his personal affairs were in order and that he had executed the necessary documents leaving everything to his wife, the said Dorothy A. Downing, that I do not desire to claim the proceeds of this policy as I believe that my son changed the beneficiary, named his said wife, and that the application made to the Veterans Administration for payment to me of the proceeds of said policy was made for the purpose of assigning said proceeds to the Dorothy A. Downing, and for no other purpose."

Here again we maintain that such evidence is inadmissible to prove a change of beneficiary and were admissible, if at all, only for the purpose of showing a

state of mind or intent. Furthermore, the instrument was executed in an unselfish attempt to give the proceeds herein to the appellee. In her testimony the affiant, Gertrude Downing, testified that her son had never told her that he had executed documents transferring his insurance to his wife, but that he told her that all of his affairs were in order. It is readily understandable that this affiant in her grief over the death of her son was not too careful in reading the affidavit prepared for her by the attorney for the appellee herein.

CONCLUSION

This is not a cause wherein the appellants are attempting to secure any of the proceeds of the life insurance for the benefit of themselves personally. The money heretofore received by the appellants from the insurance policy have been kept in a trust account (Tr. 62 and 63) which remains intact. The avowed purpose testified to by the appellants is to maintain that fund for the exclusive benefit of the decedent's child. We maintain that under the law and the equities of the cause, this case should be reversed.

Respectfully submitted,

FRANCIS F. YUNKER,

Attorney for Appellants.

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

GERTRUDE I. DOWNING and PERRY
LYNN DOWNING, SR.,
Appellants,

vs.

DOROTHY A. DOWNING and UNITED
STATES OF AMERICA,
Appellees.

BRIEF OF APPELLEE,
DOROTHY A. DOWNING

Upon Appeal from The United States District
Court for the District of Oregon.

WILBUR, BECKETT, OPPENHEIMER,
MAUTZ & SOUTHER and ARNO H. DENECKE
1001 Board of Trade Building
Portland 4, Oregon
Attorneys for Appellee, Dorothy A. Downing

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In the United States
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Appellees.

BRIEF OF APPELLEE,
DOROTHY A. DOWNING

Upon Appeal from The United States District
Court for the District of Oregon.

STATEMENT OF THE CASE

This is an appeal from an action instituted by the appellee, Dorothy A. Downing, wherein she sought a determination of the court that she was the beneficiary of a National Service Life Insurance Policy. This policy was issued to her husband, Perry Downing, Jr., a lieutenant in the U.S. Army Air Force, who was killed.

Dorothy Downing and Perry Downing, Jr., had "gone together" four years and then became engaged

in February, 1943. Four days later he entered the army (Tr. 20). In April, 1943, Perry Downing, Jr., applied for National Service Life Insurance and not being as yet married, he named his mother, the appellant, Gertrude I. Downing, as principal beneficiary and his father, Perry Lynn Downing, Sr., as contingent beneficiary (Pltfs' Ex. No. 6). In September, 1943, Dorothy Downing and Perry Downing, Jr., were married, and they made their home together at various Army air fields (Tr. 20). On January 1, 1945, while they were living at Chico, California, Lieutenant Downing was alerted for overseas movement (Tr. 43). At that time, or shortly thereafter, he told his wife he was going to make her his insurance beneficiary and later on the same day, when he returned home, he told his wife he had made her his beneficiary (Tr. 31). In January, 1945, and in April, 1945, Lieutenant Downing executed Personal Affairs Statements, official documents required by the Army, in which he stated that his wife, Dorothy Downing, was the beneficiary of his National Service Life Insurance. (Pltf's. Exs. Nos. 4 and 5). Copies of these statements were sent to his wife and the letter of transmittal, written by the Army, stated that his wife, Dorothy Downing, was Lieutenant Downing's insurance beneficiary. (Pltf's. Exs. Nos. 20 and 21).

On these same statements, Lieutenant Downing stated that his wife was to receive a \$200.00 a month allotment, was to be the beneficiary of his death gratuity, and was his emergency addressee; the allotment and death gratuity were paid to Dorothy Downing without question (Tr. 24).

In April, 1945, Dorothy Downing came home to have their child, and a daughter, Linda, was born in June, 1945 (Tr. 24).

At some time during this period subsequent to January 1, 1945, Lieutenant Downing told a fellow officer and friend, Glenn Bauman, of his intention to change his insurance beneficiary, and they, Bauman and Downing, went together into the Army headquarters at Chico to change their insurance beneficiaries (Tr. 48). At this time Glenn Bauman saw Lt. Downing execute a document (Tr. 48, 51, 53). When they departed from headquarters, Lieutenant Downing told Bauman that he had taken care of his insurance (Tr. 49).

Shortly before Lieutenant Downing was sent overseas, the appellants, Dorothy Downing and daughter, Linda, came to visit Lieutenant Downing (Tr. 44, 61). Subsequently, the appellant, Gertrude I. Downing, executed an affidavit in which she stated that during this visit her son told her he had executed the necessary documents to leave everything to his wife (Pltf's Ex. No. 2).

Lieutenant Perry Downing, Jr., was killed on October 3, 1945 (Tr. 25).

The Board of Veterans Appeals, expressly on the authority of *Bradley vs. U.S.*, 143 F. (2d) 573 (CCA 10th), denied the claim of the widow, Dorothy Downing (Deft's. Ex. No. 17).

The appellee filed her complaint herein, and in answer thereto, the United States of America admitted

liability on the policy and prayed that the other parties in the action interplead their respective claims to the proceeds of the insurance policy; the trial court ordered such interpleader (Tr. 19).

The trial court, sitting without a jury, found that Perry Downing, Jr., had duly designated his wife, Dorothy Downing as the beneficiary of his National Service Life Insurance Policy, but the document so designating was inadvertently lost while it was in the possession of the United States Army, and the trial court entered judgment for the plaintiff, the appellee, Dorothy A. Downing.

SUMMARY OF ARGUMENT

The appellee, Dorothy Downing, contends that the trial court's finding of fact that Perry Downing, Jr., duly executed a change of beneficiary designating his wife as principal beneficiary of his insurance, but said change of beneficiary was inadvertently lost while in the possession of the U. S. Army, is amply supported by the evidence, and therefore, cannot be set aside as clearly erroneous.

This appellee further contends that whether or not this finding is clearly erroneous is the only issue presented to this Court by this appeal. The appellants direct most of their brief to the question of whether certain exhibits and statements are sufficient to constitute a change of beneficiary. The trial Court did not find it necessary to decide this issue as it found that an actual

change of beneficiary had been executed but had been lost.

The appellee, Dorothy Downing, submits that had the trial court found that the execution of certain documents by the deceased coupled with the statements and other activities and circumstances of the deceased did constitute a change of beneficiary, such a finding would also have been supported by the evidence and not be clearly erroneous. For this reason, the appellee submits an answer to the appellants' arguments concerning this hypothetical finding, which arguments are advanced under First Specification of Error.

ARGUMENT ON FIRST SPECIFICATION OF ALLEGED ERROR

The trial court did not hold or find that a Personal Affairs Statement (Pltf's. Ex. No. 4) and statements made by the deceased constituted a change of beneficiary. If the Court had found that a Personal Affairs Statement (Pltf's. Ex. No. 4) and statements made by the deceased constituted a change of beneficiary, this evidence, together with other evidence admitted at the trial would have fully supported such a finding.

National Service Life Insurance is regulated by the Veterans Administration. The applicable Veterans Administration regulation stated that a change of beneficiary should be made by a notice in writing to be signed by the insured and forwarded to the Veterans Administration. A change of beneficiary of National Service

Life Insurance can undoubtedly be duly effected without compliance with the Veterans Administration regulations. The appellants do not seriously contend to the contrary. In all of the cases cited by appellants no compliance with the regulation was even suggested, and yet in all of these decisions, except *Bradley vs. U. S.*, 143 F. (2d) 573 (CCA 10th), the Court found that a change had been effected. Even in *Bradley vs. U. S.*, *supra*, at p. 576, the court recognized that compliance with the Veterans Administration regulations was unnecessary.

“Strict compliance with the applicable regulations is not however requisite to the maintenance of that burden of proof (burden to show a change of beneficiary) * * * With respect to regulations pertaining to the authorized change of beneficiary in war risk insurance cases, the courts have brushed aside all legal technicalities in an effort to effectuate the manifest intention of the insured.”

These regulations are for the protection of the insurer, the Veterans Administration. The active parties in this appeal are claimants to the benefits of this insurance and neither can invoke the aid of a regulation intended for the benefit of the insurer. In this action, the United States, representing the insurer, did not invoke the protection of the regulation but rather by their answer waived compliance with the regulation and admitted liability on the policy and prayed for an order of interpleader requiring the clamants to interplead their respective claims and the trial court so ordered (Tr. 9, 19).

The purpose of the regulation and a waiver by the United States were illustrated in *Collins vs. U. S.*, 161 F. (2d) 64, 70 (CCA 10th).

"But there is yet another reason why the judgment must be reversed. The purpose of a regulation designating the manner in which a change of beneficiary under a National Service Life Insurance policy should be made is for the convenience and protection of the government, and may be waived by it."

It appears to this appellee that the requirements of Veterans Administrations regulations are not material or relevant to the issue in this appeal.

All the decisions concerning whether or not a change of National Service Life Insurance beneficiary has been accomplished are in agreement on the general rule of law to be applied. The two elements composing this general rule are stated by the Court in *Shapiro vs. U. S.*, 166 F. (2d) 240, 241 (CCA 2nd).

"The decision was essentially based on findings of the judge that the insured had expressed an intention to change the beneficiary originally named in his policy and had done an affirmative act to effectuate the intention. Whether these findings are correct is the chief dispute on the present appeal. We can see no reason to doubt that they are supported by substantial evidence and that the judgment rendered was not only justified but required by the proof."

In the present action, the trial court had an abundance of evidence from which it could find that the deceased soldier had the intent to change his beneficiary and did affirmative acts to effectuate this intention.

Appellants do not appear to seriously question that there is adequate evidence of the requisite intent, but in this regard mention supposed marital difficulties between

the deceased and this appellee (App. Br. 8). It was admitted at the trial that any possible objective evidence of these supposed difficulties occurred after Lt. Downing went overseas and after the occurrences which the appellee relied upon to establish a change of beneficiary (Tr. 35).

The fallacy of the innuendos appellants ascribe to the deceased's acts and statement is illustrated by one conclusion stated by the appellants in their brief:

"This intention (to not remain with his wife) is also borne out by his statements that he wanted to remain in the Armed Services." (App. Br. 8)

In considering the second requirement, affirmative acts to effectuate the intention, appellants attempt to fit this case into the facts of *Bradley vs. U. S.*, *supra*, by mentioning only one of the several positive affirmative acts of Lieutenant Downing; they mention only the one Personal Affairs Statement (Pltf's. Ex. No. 4).

If it were assumed that the facts in *Bradley vs. U.S.*, *supra*, were comparable to those here involved, this Court need not find such decision persuasive as it does not represent the consensus of judicial opinion on this subject; on the contrary, it is the only decision holding a change of beneficiary was not accomplished.

In *Bradley vs. U. S.*, *supra*, there was a dissent by Judge Phillips. The dissenting judge was of the opinion that the executing of a Personal Affairs Statement together with the acts recited in the Statement were sufficient to bring about a change of beneficiary. Judge

Phillips' view was approved in *Shapiro vs. U. S.*, *supra*, at p. 242. The Court said:

"If the Bradley decision be thought to differ, the conclusion reached in the dissenting opinion of Judge Phillips accords with our own views."

A like opinion was held by the Court in *Mitchell vs. U. S.*, 165 F. (2d) 758 (CCA 5th) and in *McKewen vs. McKewen*, 165 F. (2d) 761 (CCA 5th).

In *Mitchell vs. U. S.*, *supra*, the deceased soldier executed a government insurance report form stating that his wife was his beneficiary. The Court stated at page 760:

"The case presents only the question as to whether Harwick's naming his wife the beneficiary on the government insurance report form can be considered such an affirmative act as to evidence an exercise of his right to change the beneficiary."

The Court held that a change had been accomplished.

In *McKewen vs. McKewen*, *supra*, two Officers' Data Sheets similar in form and identical in purpose to a Personal Affairs Statement, together with a government insurance report form, were held to be sufficient evidence of a change of beneficiary. In the opinion the Court said concerning these Data Sheets:

"We place much stress upon the fact that the two documents signed in Kearney, Nebraska, and the one signed at his station in Europe were official documents—signed by an officer of the United States Army on the direction of the insurer, his government. Assuredly, they were not false. The declarations in these documents are not in the category of unofficial, ex parte or oral statements

made to the wife or to the mother in response to inquiries, or in answer to protests against the making of someone the beneficiary."

It is the appellee's belief that it is not necessary in the present appeal for the Court to determine the correctness of either the majority opinion in *Bradley vs. U. S.*, *supra*, or the other decisions above cited. This appellee submits that there is present here evidence of a kind that was not present in *Bradley vs. U. S.*, *supra*. In this case, in addition to the one Personal Affairs Statement, there was introduced into evidence a second Personal Affairs Statement (Pltf's. Ex. No. 5). One was executed December 28, 1944 (Pltf's. Ex. No. 5), and the other April 10, 1945 (Pltf's. Ex. No. 4). Both state that Dorothy Downing, the appellee, is the beneficiary of the officer's insurance. Additional evidence that the appellee was made beneficiary is as follows: Lieutenant Downing told his wife he had been to the base and changed his beneficiary that day (Tr. 23); the deceased soldier, together with Glenn Bauman, a fellow officer, went to their Headquarters and Lieutenant Downing told Bauman that he was going to change his beneficiary and he told Bauman upon leaving the Headquarters that he had taken care of it (Tr. 49); on this particular occasion when the deceased was in Headquarters, Bauman saw him fill out some sort of document (Tr. 48, 51, 53); and the appellant, Gertrude I. Downing, made an affidavit in which she stated: "He told me . . . that he (her son) executed the necessary documents leaving everything to his wife" (Pltf's. Ex. No. 2).

Of course, the fact that Dorothy Downing was the

soldier's wife and the mother of his small child are important in this connection. Lieutenant Downing indicated his regard for this relationship by providing that all other financial benefits which can be awarded by a soldier would be paid to Dorothy Downing (Tr. 24).

Evidence very similar to that here involved was held in *Roberts vs. U. S.*, 157 F. (2d) 906 (CCA 4th), to constitute a change of beneficiary. In that case, a brother officer testified that he and the deceased went to their headquarters to change their insurance beneficiaries and other benefits in favor of their wives. He saw the deceased fill out some documents. No change of beneficiary was ever found, although a confidential report, similar to the Personal Affairs Statement, was found and this report named the wife as beneficiary.

The Court found a change of beneficiary had been effected and stated at page 909:

"It will be seen that the judgment below rests upon the absence of the change of beneficiary from the Government's files and upon the testimony of the uncle as to his conversations with the insured. It seems clear to us that these factors are insufficient to outweigh the clear and undisputed written evidence in the insured's admitted handwriting that he had designated his wife as beneficiary of the insurance policy, especially since these writings are supported by the disinterested testimony of the brother officer who assisted the insured to change the beneficiary and saw him execute the document and deliver it to the clerk at the Naval air base."

The appellee submits that if the trial court had found that the conduct, statements and Personal Affairs State-

ments of the deceased soldier constituted a change of beneficiary, such a finding would have been correct and fully substantiated by the evidence.

ARGUMENT ON SECOND SPECIFICATION OF ALLEGED ERROR

The trial court did not err in finding that the deceased soldier had executed a change of beneficiary, naming his wife as beneficiary, but that such document was inadvertently lost while in the possession of the United States Army.

There can be no doubt that if a change of beneficiary had been executed by the deceased but later had been lost by the Army, such facts would effectively accomplish a change of beneficiary. The appellants do not contend to the contrary.

Rule No. 52 of the Rules of Civil Procedure states in part as follows:

“ . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . . ”

This rule is applicable to the type of case herein involved.

McKewen vs. McKewen, *supra*, at page 765:

“We should not disturb the finding and judgment of the court below because there is substantial evidence to support his findings. (Rule 52, Federal Rules Civil Procedure, 28 U.S.C.A. Following section 723c.)”

Therefore, it is evident that unless the trial court's finding is clearly erroneous, the finding and the judgment based thereon must be affirmed.

The evidence that Lieutenant Downing actually executed the necessary documents to change his beneficiary to his wife is the same evidence as outlined in appellee's argument on the first specification of alleged error. Particularly applicable is Bauman's testimony that the deceased filled out a document in Bauman's presence, which Bauman believed to be a change of beneficiary (Tr. 48, 51, 53). Appellants discard this testimony as hearsay (App. Br. 11). Such testimony was not objected to on this ground at the time of the trial. Even if it had been, it would have been admissible. Few, if any cases on this subject, would have been litigated if testimony such as Bauman's was inadmissible.

Because of the military background of this case, the fact that the document changing the beneficiary was not found is not necessarily indicative that it was not executed. In cases involving veterans of both World War I and World War II, courts have taken cognizance of the fact that Army and Navy channels of communication are not as reliable as civilian channels and that essential documents, such as a change of beneficiary, have been lost while under military control.

In *Roberts vs. U. S.*, *supra*, at page 909, the Court commented on this situation as follows:

"The discrepancy in the dates in other papers and the failure of the change of beneficiary to reach its destination is easily understood when one considers

the volume of business transacted at military posts and the character of the administrative organization thrown together to meet the emergency of war."

In *Walker vs. U. S.*, 70 F. Supp. 522 (S.D. Tex.), it was found that prior to the soldier's death a document reached the Veterans Administration and they were thereby notified that the wife was the deceased's beneficiary. This document was not found when the Veterans Administration was called upon to decide who was the beneficiary of the deceased's insurance. It was not known what kind of a document reached the Administration or of what soldier's benefit the wife was to be the beneficiary. The Court presumed that a proper document had been executed but was lost and found that the insurance beneficiary had been changed to the wife.

Farley vs. U. S., 291 Fed. 238 (D. Ore.). In this case, the Court found that the deceased had signed a blank form which he understood was to change his insurance beneficiary and that the signed document was presented to McDougall, company clerk. No trace of this document was found after it was placed in McDougall's possession. The Court held that a change of beneficiary had been effected by this action on the part of the deceased.

CONCLUSION

The appellee believes it significant that the Federal Judiciary has been required on numerous occasions to

pass upon whether or not a change of beneficiary of National Service Life Insurance has been accomplished, and only in one instance, *Bradley vs. U. S.*, *supra*, did a Court find that a change of beneficiary had not been duly effected. In addition to the cases cited in the briefs of both parties, the following cases also held that a change of beneficiary had been accomplished: *Woods vs. U. S.*, 69 F. Supp. 760 (M.D. Ala.); *Citron vs. U. S.*, 69 F. Supp. 830 (D.C.); *Egleston vs. U. S.*, 71 F. Supp. 114 (L.D. Ill.); *Shannon vs. U. S.*, 78 F. Supp. 263 (N.D. Ga.).

The only issue before this Court is whether or not the finding of the trial Court that a change of beneficiary was executed by the deceased but was subsequently lost is clearly erroneous. The appellee, Dorothy Downing, contends that such finding is not clearly erroneous, but, on the contrary, is adequately supported by substantial evidence.

Respectfully submitted,

WILBUR, BECKETT, OPPENHEIMER,
MAUTZ & SOUTHER, and
ARNO H. DENECKE,
Attorneys for Appellee,
Dorothy A. Downing.



